

* See the second and third Articles of the fourth Section of Partnership.

III.

3. They ought to divide the profits which they have made.

The Heir who before the Partition has had the enjoyment of any Lands or Tenements, of a Rent, or other thing belonging to the Inheritance, ought to divide with his Co-heirs the Fruits and other Revenues which he has received. And even the Heir who shall happen to have had the Enjoyment of the whole Inheritance, whilst his Co-heirs were ignorant of their Right, or were absent, ought to be accountable to them for the profits which he has made out of the common Estate^h.

^h Non est ambiguum, cum familiæ eriscundæ titulus inter bonæ fidei judicia numeretur, portionem hereditatis, si qua ad te pertinet, incremento fructuum augeri. *l. 9. C. fam. erisc.*

Non solum in finium regundorum, sed & familiæ eriscundæ iudicio præteriti quoque temporis fructus veniunt. *l. 56. eod.*

Fructibus augetur hereditas, cum ab eo possidentur à quo peti potest. *l. 2. C. de pet. hered.* Fructus omnes augent hereditatem, si ve ante aditam, si ve post aditam hereditatem accesserint. *l. 20. §. 3. in f. ff. de hered. pet.*

Coheredibus divisionem inter se facientibus iuri absentis & ignorantis minimè derogari, ac pro indiviso portionem eam, quæ initio ipsius fuit in omnibus communibus rebus, eum retinere certissimum est. Unde portionem tuam cum rebus arbitrio familiæ eriscundæ, percipere potes, ex facta inter coheredes divisione, nullum præjudicium timens. *l. 17. C. fam. ere.* See the ninth and tenth Articles of the third Section of Interest, Costs and Damages, and Restitution of Fruits.

IV.

4. And even what has been added to it by Industry, the Expenses being deducted.

If he who has enjoyed the Fruits and other Revenues of the Inheritance, had by his Industry made more thereof than his Co-heirs would have been able to do, he shall be bound nevertheless to restore the value of the profits which he has made. For there are no Fruits, or at least but very few, which are reaped without some Industry; and it is still the Land that has produced themⁱ. But out of the profits which he has made, he is allowed to deduct the Expenses he has been at, which would be allowed even to an unjust Possessor^j.

ⁱ Cum hereditas petita sit, eos fructus quos possessor percepit, omnimodo restituendos, etsi petitor eos percepturus non fuerat. *l. 56. ff. de hered. pet.*

^j Fructus intelliguntur deductis impensis, quæ querendorum, cogendorum, conservandorumque eorum gratia sunt. Quod non solum in bonæ fidei possessoribus naturalis ratio exposulat, verum etiam in prædonibus, sicut Sabino quoque placuit. *l. 36. §. ult. ff. eod.*

V.

If an Heir or Executor has laid out Money either necessarily or to advantage, on the Affairs of the Inheritance, he shall recover it, together with the Interest due from the time that he advanced it^m.

5. They ought to reimburse one another the Interest of Money which has been advanced.

^m Sumptuum quos unus ex heredibus bonæ fide fecerit, utrasque consequi potest à cohærede, ex die moræ, secundum rescriptum Imperatorum Severi & Antonini. *l. 18. §. 3. ff. fam. erisc.* Si quid unus, ex sociis necessario de suo impendit in communi negotio, iudicio societatis servabit, & utrasque, si forte mutuas sub utrisque, dedit. Sed etsi suam pecuniam dedit, non sine causa dicitur, quod utrasque quoque percipere debeat. *l. 67. §. 2. ff. pro socio. l. 52. §. 10. eod.*

The condition of Co-heirs ought to be in this respect the same with that of Partners. See the eleventh Article of the fourth Section of Partnership, and the fourth Article of the second Section of those who have, &c.

We have put down in the Article, that the Heir or Executor recovers the Interest of what he lays out necessarily, or to advantage: altho' it is said in the first of the Texts cited on this Article, that if the Heir has disbursed any thing honestly and fairly, he shall have the Interest of it. For it may happen, that an imprudent Heir may lay out honestly foolish Expenses. Thus the honesty and integrity of the Heir ought to be reduced to Expenses which it is just to allow; that is to say, such as are necessary or profitable.

We have likewise said in the Article, that the said Interest is due from the time that the Money was advanced, altho' it be said in the same Text, that it is due from the time of the delay, ex die moræ. For this Interest is due to this Heir, in the same manner as to a Partner, as has been said in the eleventh Article of the fourth Section of Partnership, and the reciprocal honesty and integrity which Co-heirs owe to one another demands this mutual Justice among them.

VI.

In the cases where the Co-heirs may have any Goods which ought to be brought in into the Mass of the Inheritance, they are obliged every one of them to bring in reciprocally all the Goods which they have of this kind, in order to augment thereby the Mass of the Inheritance, and that they may be comprized in the Partition, according to the Rules of this matter explained in their proper placeⁿ.

6. They ought to bring into the Mass of the Inheritance the things which ought to be brought in.

ⁿ See touching this matter of bringing in Goods into the Mass of the Inheritance the fourth Title of the second Book. See the thirteenth Article of the fifth Section, and the fourth Article of the first Section of Partitions.

VII.

Whilst the Goods of the Inheritance remain undivided, none of the Co-heirs can make any change in them, against the will, or without the knowledge of the others; and much less can he alienate them. And any one of them that does not approve of the change, or alienation, may hinder it^o; unless the same

7. One Heir cannot make any changes without the consent of the others.

ould be necessary for the com-
1. As if any necessary Repairs
be made, or things to be sold
ould not well be preserved from
For in these cases the Judge
ould have no regard to the unreason-
ble opposition of a Co-heir?

* Sabinus in re communi neminem dominorum
jure facere quicquam, invito altero, posse. Unde
manifestum est prohibendi jus esse. In re enim
pari, potius esse causam prohibentis, constat.
l. 28. ff. comm. divid.

† Alienationes post iudicium acceptum inter-
dictæ, dumtaxat voluntarie, non quæ vetustiores
causam, & originem juris habent necessariam. l. 13.
ff. fam. ereiscund.

Ne in totum diminutio impedita, in aliquo etiam
utilitates alias impediatur. l. 5. ff. de hered. pet. Sed
& res tempore perituras permittere debet prætor
distrahere. d. l. in f. pr. See the sixth, seventh,
eighth, ninth, and tenth Articles of the second Sec-
tion of those who happen to have any thing in
common together, where other Rules on the same
subject are explained.

VIII.

8. Engage-
ment to
come to a
Partition.

We may reckon among the Engage-
ments which precede the Partition, that
very Engagement which obliges the
Heirs to come to a Partition, when any
one of them demands it; for each of
them has a right to have separately to
himself that which may fall to his share
of the Goods of the Inheritance, altho'
the others should be willing to keep
them in common.

† Arbitrium familiæ ereiscundæ vel unus petere
poteft. Nam provocare apud iudicem vel unum
hæredem posse palam est. Igitur & præsentibus
cæteris, & invitis poterit vel unus arbitrium po-
scere. l. 34. ff. fam. ereisc. See the eleventh Arti-
cle of the second Section of those who happen to
have any thing in common together.

SECT. XIII.

*Of those who are in the place of
Heirs or Executors, altho' they
are not really so.*

There are, properly speaking, only
two kinds of Heirs, those to
whom the Law gives the Succession,
and those who are called to it by a Tes-
tament: and the name of Heir is given
only to those who succeed by one or
other of these two ways. But there are
other Titles which transmit all the
Goods of a person after his death to
other kinds of Successors, or rather Pos-
sessors, who altho' they are not Heirs,
have nevertheless the same Rights, and
are subject to the same charges. This

shall be the subject matter of this
Section.

The CONTENTS.

1. *The Exchequer is in the place of Heir
to the Goods of a Condemned Per-
son.*
2. *And to the Estates of Aliens, or Fo-
reigners.*
3. *And of Bastards.*
4. *And of those who have no Relations.*
5. *All these sorts of Goods go to the King
with their burdens.*
6. *The universal Donee is in place of
Heir.*
7. *The Purchaser of the Inheritance is in
the place of Heir.*
8. *The Curator to a vacant Succession re-
presents the Heir.*

I.

ALL the Goods of persons con-
demned to Death, or to other
Punishments which imply Forfeiture of
Goods, accrue to the King, and he is
in place of universal Successor; but the
quality of Heir does not suit with him.
For whereas the Estate does not pass to
the Heir but by the death of the person
to whom he succeeds; Forfeiture is a
Title which deprives the condemned
person of his Estate before his death,
and appropriates it to the King, as
exercising the Sovereign Authority of
Justice, and the Rights which apper-
tain to it. And the Lords of Mannors
who have the Right of Forfeiture with-
in their own Lands, have it only as an
Accessory to the Right of Justice; and
they are not lookt upon as Heirs, but
become Masters of the forfeited Goods.

* Damnatione bona publicantur, cum vita adimi-
tur, aut civitas. l. 1. ff. de bon. dam. See the Pre-
face to this Second Part, N^o. XIV.

Forfeiture had not the same effect by the Roman Law
that it has by our Usage in France. For according to
our Usage the Children of those persons whose Goods are
forfeited do not succeed to them, nor have they any share
in their Goods. But by the Roman Law they were al-
lowed a share of them. Which was founded on Motives
of Equity and of Humanity, that the Children might
not be punished for the crime of their Fathers, in which
they had no hand, and that they might not be deprived
of a Succession which Nature destined for them, nor be
reduced to a necessity which might have fatal consequen-
ces. Which is particularly pointed at by these words of
a Law, Cum ratio naturalis, quasi lex quædam taci-
ta liberis parentum hereditatem addiceret, velut ad
debitam successionem eos vocando, propter quod
& in iure civili suorum nomen eis indictum est;
ac ne iudicio quidem parentis, nisi meritis de cau-
sis summoventi ab ea successione possunt: æquissi-
mum existimatum est eo quoque casu quo propter
pœnam parentis auferret bona damnatio, rationem
haberi liberorum, ne alieno admisso, graviolem pœ-
nam lucent, quos nulla contingeret culpa: interdum

in summam egestatem devoluti. Quod cum aliqua moderatione definiti placuit, ut qui ad universitatem venturi erant, jure successionis ex ea portiones concessas haberent. l. 7. ff. de bon. dam. It is not necessary to draw a parallel here between the Roman Law and the Law of France in this matter, that being no part of the design of this Book. We shall only observe, that there are some Customs in France where Confiscations do not take place.

II.

2. And to the Estates of Aliens, or Foreigners.

The Goods of Foreigners who die without being naturalized, and who leave behind them no lawful Heirs born in France, or Naturalized, who are capable of succeeding to them, belong to the King, by virtue of the Right which he has of succeeding to the Estates of Aliens^b. And he takes the said Goods, not as Heir, but as Master or Owner of Goods to which no person can have any right.

^b See the ninth Article of the second Section of this Title, and the eleventh Article of the second Section of Persons.

See the third Article of the fourth Section of this Title, and the remark that is there made on it.

III.

3. And of Bastards.

Bastards who die without Children lawfully begotten, and without making a Will, having no Heirs, their Estates for this reason belong to the King, and he succeeds to them, not as Heir, but as possessing as Master an Estate which cannot pass to any Successor^c.

^c See the eighth Article of the second Section of this Title, and the third Article of the first Section of Persons.

What is said in this Article of the King's succeeding to Bastards, is to be understood likewise of the Lords of Mannors within the bounds of their respective Lands.

IV.

4. And of those who have no Relations.

Those who die without Descendants or Ascendants, and without any Relations either by Father or Mother, and who have not disposed of their Estates by Will; they dying without Heirs, their Estates belong to the King by virtue of the Right which he has to succeed to all persons who die without Heirs or Executors^d.

^d Scire debet gravitas tua, intestatorum res, qui sine legitimo heredede decesserint, fisci nostri nobis vindicandas. l. 1. C. de bon. vac. & de inc.

Vacantia mortuorum bona tunc ad fiscum jubemus transferri, si nullum ex qualibet sanguinis linea, vel juris titulo legitimum reliquerit intestatus heredem. l. 4. eod.

What is said in this Article concerning the King's Right to the Successions of those who die without Heirs or Executors, is likewise to be understood of Lords of Mannors within the bounds of their Lands.

It is necessary to remark on this Article what has been said concerning the Succession of the Husband to the Wife, and of the Wife to the Husband, in default of Relations,

in the Preface to this Second Part, No. XI. and what shall be said on the same subject in the third Section of the third Title of the second Book, that when there is no Testament, and where the deceased has left no Relations, the Husband succeeds to the Wife, and the Wife to the Husband, and exclude the Exchequer.

It is to be observed likewise on the subject of Successions for want of Relations, that there are some Customs in France, where upon failure of Relations by one Stock, the Lord of the Mannor is preferred to the Relations of the other Stock; so that in those Customs those who have only Effects which they have inherited of one Stock, and leaving behind them only Relations of the other Stock, die without Heirs.

V.

These four ways by which Estates are acquired to the King, to wit, Forfeiture, Succession to Aliens, to Bastards, and to those who die without Heirs, have all of them this in common, that as they transmit all the Goods to the King, so he is in the place of Universal Successor, and the said Goods remain subject to all the debts, and to the other charges^e.

^e Si, ut proponis, bona ejus qui tutelam tuam administrabat sententiam passi, ad fiscum sunt devoluta, procuratorem nostrum adire cura. Qui, si quid jure posci animadverterit, non negabit. l. 4. C. de bon. profer. seu damn.

When Estates devolve to the Crown by any of the ways explained in this Article, they belong either to those who have a Mortgage on the King's Demesnes, or to those who farm them, or in case there be neither Mortgagees, nor Farmers, who can claim any right to the said Estates, the King usually makes Grants of them, which according to the Ordinances are always made upon this condition, that the Grantees shall acquit all the charges. See the Ordinance of Charles VII. of the thirtieth of January, 1455. Vid. lib. 1. & 2. C. de petit. bon. subl.

VI.

We may reckon among the number of those who are in the place of Heirs, altho' they have not that quality, universal Donees, that is, those to whom any person makes over by Deed of Gift in his life-time all the Goods which he possesses at present, or shall afterwards acquire. For these Donees having all the Goods, they are bound for all the Charges by the effect of their Title. But the name of Heir is not applicable to them, because the Goods which the Donor possessed at the time of the Donation, did from that moment belong to them irrevocably, and the Donor could not alienate them. And altho' he might dispose of his other Goods which he acquired afterwards, by Alienations which he was at liberty to make in his life-time, yet he could not leave them by Will to other persons. Thus, it is as Donees that they succeed to the Goods, and not as Heirs^f.

* See the eighth Article of the first Section of Donations, and the thirty fifth Law, §. 4. Cod. de don. which is there cited, and which approves of universal Donations of all the Goods. Sed & si quis universitatis faciat donationem, five bellis, five dimidia partis sue substantiæ, five tertiæ, five quartæ, five quantæcunque, vel etiam totius, &c. This Law has raised a doubt, whether by the Roman Law one can make a Donation of the Goods which he shall afterwards acquire, because there can be no delivery of them, as there may be of Goods which one has in his present Possession; and this might be given likewise as another reason for it, that by the Roman Law one cannot divest himself of the liberty of making a Will, by an irrevocable institution of an Heir, not even in favour of Marriage.

Pactum quod dotali instrumento comprehensum est, ut si pater vita fungeretur, ex æqua portione ea quæ nuberet cum fratre, hæres sui patris esset, neque ullam obligationem contrahere, neque libertatem testamenti faciendi mulieris patri potuit auferre. l. 15. C. de pactis. But according to the Usage in France, one may name an universal Heir by an institution in a Contract which cannot be revoked, as has been already mentioned in the Preface, N^o. X. And one may likewise give all his Goods which he enjoys at present, or shall acquire for the future, by a Donation that is to have its effect in his life-time, and is irrevocable, provided the Donor reserve to himself an Usufruct, or something whereupon to subsist. For it would be contrary to Equity and Humanity, that he should be stripped of all. Thus the universal Donee may, after the death of the Donor, take possession of all the Goods in the same manner as the Heir. But because he who has made a Donation of all his Goods present and to come, may alienate the Goods which he has acquired since the Donation, and contract new debts; it is not just, that after the death of the Donor, the Donee should be at liberty to content himself with the Goods which the Donor had at the time of the Donation, and to bear the Charges thereof which were due at that time, and to renounce the Goods acquired by the Donor after the Donation, and by that means to free himself from the debts and charges contracted afterwards. For which reason it is, that in this case an universal Donation of all ones Goods present and to come, is distinguished into two Donations: one, of all the Goods which the Donor possesses at the time of the Donation; and the other, of those Goods which the Donor may acquire afterwards. Which distinction is commonly founded on this, that in Stipulations which contain several Sums, or several Things, there are as many Stipulations as there are Sums or Things; * for it is certain, that he who has stipulated from a Debtor things of several kinds, may demand only such of them as he pleases. But this Maxim does not prove, that all sorts of Covenants may be divided; and if this division should be prejudicial to the interest of one of the Parties, it would be necessary, according to another Rule, either to execute the whole Covenant, or to break it entirely. Because when there is an Obligation on both sides, the mutual Engagements ought to subsist^b. Thus we may add as more particular reasons why the Donation of Goods which the Donor is in present possession of ought to subsist, first, because the said Donation is pure and simple by the Contract, and that the Donation of Goods to be acquired implies a condition that the Donor should afterwards acquire Goods; which he cannot be said to do, if he acquires no more than what is necessary to pay the Debts; for, properly speaking, that is only to be called Goods which remains after the debts are paid. And in the second place, it would not be just that the Donor should have it in his power to annul the Donation by contracting Debts, which has been a motive for ratifying the Donation of the Goods which were in the possession of the Donor when he gave them away; in which there is no injury done to the Creditors, who have contracted only after the Donation, which they ought to have known of. But if the Donee has taken possession of the Goods after the death of the Donor without making an inventory of them, he can-

not afterwards divide the Donation; and his case is the same as if he were Heir purely and simply. See as to the division of an Act, the Remark on the nineteenth Article of the fifth Section of Testaments.

^a Scire debemus in stipulationibus, tot esse stipulationes quot summiæ sunt, totque esse stipulationes quot species sunt. l. 29. ff. de verb. oblig.

^b See the seventh Article of the second Section of Covenants, and the tenth and eleventh Articles of the first Section of Rescissus. Non debet ex parte obligationem comprobare, ex parte tanquam de iniqua queri l. 39. in f. ff. de oper. lib. Aut in totum agnoscere, aut a toto recedere. l. 16. in fin. ff. de admin. & per. tutor.

VII.

We may likewise consider him as ^{7. The Purchaser of the Inheritance is in place of Heir.} Heir, to whom an Inheritance has been sold, altho' he is not in effect Heir, not having succeeded to the deceased, and having the Goods only by the Title of Sale. But as he has the Rights belonging to the Heir, and being in Possession of all the Goods, is bound for all the charges, he is therefore in the place of Heir⁸.

⁸ Sicuti lucrum omne ad emptorem hereditatis respicit, ita damnum quoque debet ad eundem respicere. l. 2. §. 9. ff. de hered. vel auct. vend. See the eighth Article of the first Section of the third Title.

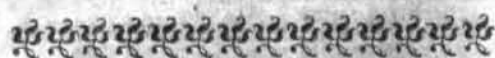
VIII.

When a Succession is abandoned, and ^{8. The Curator to a vacant Succession represents the Heir.} the Creditors get a Curator to be named, or that a Curator is named to Successions to which there is no apparent Heir, in order to take care of the effects; the said Curators prosecute the Hereditary Actions, and acquit the Charges: and those who have any claim or demand on the Estate, bring their Actions against them. Thus, they represent in this sense the persons either of the Heirs, if there be any, or of those to whom the Goods may belong^b.

^b Et sique curatoribus actiones, & in eos utiles competunt. l. 2. §. 1. ff. de cur. bon. dando. See the fifteenth Article of the first Section of Curators.

Vacant Successions, to which there is no apparent Heir, are put under the Administration of a Curator, until an Heir shall appear, or that the Goods are acquired either to the King, or to the Lord of the Manor. And Curators are likewise named to Estates that are abandoned to the Creditors, till the Goods be sold for payment of the Debts.





TITLE II.

Of HEIRS, or EXECUTORS, with the benefit of an INVENTORY.

WE have seen in the fourth Article of the fifth Section of the first Title, that the Heir or Executor, who doubts whether the Succession be advantageous, may take a time to deliberate whether he shall accept or refuse it; and in the fifth Article of the same Section, that in case of any such doubt the Heir or Executor may without deliberating accept the Succession with the benefit of an Inventory. Which has this effect, that if the Charges appear afterwards to exceed the value of the Goods, he will be accountable only for so much as the Goods amount to; whereas if he did not make use of the said benefit, he would be simply and purely Heir or Executor, and liable to all the Charges of the Inheritance, altho' the Effects should not be sufficient to acquit them.

Of these two ways which the Law has established for the Security of Heirs or Executors, the first that was in use at Rome was the Right of Deliberating. This Right was invented, as it is said in a Law, both for the interest of the dying persons, that they might have Heirs to succeed them, being thereto allured by the liberty which they had to inform themselves of the state of the Goods and Affairs of the Succession before they should engage in it; and likewise for the advantage of the Heirs themselves, that they might not be obliged to engage themselves too hastily in that quality^a.

^a Qui interrogatur an hæres, vel quota ex parte sit—ad deliberandum tempus impetrare debet. Quia si perperam confessus fuerit, incommodo afficitur. Et quia hoc defunctorum interest, ut habeant successores; interest & viventium, ne præcipitentur, quamdiu jussè deliberant. l. 5. & l. 6. ff. de interrog. in jur. fac.

The method of using this Right of Deliberating, was after this manner: The Heir who was called to a Succession, either by a Testament, or as having right to succeed to one dying Intestate, applied to the Magistrate for a

time to deliberate, and a delay was granted him at least of a hundred days^b. During that time, the Papers belonging to the deceased were communicated to the Heir, and he examined all the debts owing by the deceased by the Titles or Deeds of the Creditors, in order to take his measures for accepting or refusing the Succession^c. And even those who named their Heirs might, by the ancient Law, regulate by their Testaments a certain time which they gave them to deliberate, after the expiration of which the Heir who did not accept the Succession within that time, was excluded from it^d; but this was afterwards abolished^e.

^b Ait prætor, si tempus ad deliberandum petet, dabo. l. 1. §. 1. ff. de jur. delib.

^c Pauciores centum dierum non sunt dandi. l. 2. eod.

^d Aristo existimat, prætorem aditum, facultatem facere debere hæredi, rationes defuncti ab eo petere, penes quem depositæ sunt, deliberanti de adeunda hereditate. l. 28. ff. de acq. vel omitt. hered.

^e Aristo scribit, non solum creditoribus, sed & hæredi instituto prætorem subvenire debere: hisq; copiam instrumentorum inspiciendorum facere, ut perinde instruere se possint, expediet, necne agnoscere hereditatem. l. 5. ff. de jur. delib.

^f Titius hæres esto: cernitoq; in diebus centum proximis quibus scies, poterisq; Nisi ita creveris, exhæres esto. V. Ulp. Tit. 22. §. 27. & seq.

^g l. 17. C. de jur. delib.

This faculty of deliberating was of no other use, but to give the Heir time to examine whether it would be for his advantage to accept the Succession, or whether it would be better for him to renounce it: and seeing he was obliged after that time to resolve either to accept the Inheritance purely and simply, and to engage himself for all the charges, or to renounce it, without being at liberty to chuse any middle way, there followed from thence several inconveniences both to the Heirs, and also to the Legataries and Creditors. For the Heirs might easily be deceived by the appearance of the Goods, the charges whereof might be difficult, or even impossible to be known, they being often secret and hidden; and they being once engaged in burdensom Successions, they could not be afterwards at liberty to renounce them. And they might likewise be deceived in another manner, by renouncing Successions which might happen to be of greater value, and attended with fewer charges than did appear, which was to the prejudice of the Creditors and Legataries.

These inconveniences lasted for several Ages, and until the time of Justinian, without any other remedy besides that

that of an Exception which the Emperor *Gordian* had made in favour of Soldiers who happened to be engaged in burdenson Successions, to whom the said Emperor granted this Privilege, that their own Goods should not be subject to the charges of the Succession^f, which was difficult to be put in practice without an Inventory, by which it might appear wherein the Goods of the Succession did consist. And at last *Justinian* established in favour of all Heirs, whether they succeeded by Testament, or to Intestates, of whatsoever quality or condition without any distinction, a liberty to accept with the benefit of an Inventory the Succession that falls to them, that is to say, on condition that they shall not be liable to the Charges farther than the value of the Goods, of which an Inventory ought to be made by a publick Officer. Which has this effect, that the Creditors, Legataries, and other persons concerned, may have knowledge of all the Goods of the Inheritance which are appropriated to them, and that the Heir does not engage his own Estate, but obliges himself only to account for what is contained in the said Inventory: And by this means full and intire Justice is done, both to the Heirs, to the Legatees, and to the Creditors^g.

^f *L. ult. in princip. C. de jur. delib.*

^g See the second Section of this Title.

As the first use of the benefit of an Inventory is to give the Heir or Executor the liberty of deliberating, whether he shall accept the Succession or not, and of doing it with the greater safety, because of the knowledge of the Goods and Charges of the Inheritance, which he may have from the Inventory; so this benefit of an Inventory has not abolished the use of Deliberating; and *Justinian* has reserved it in the same Law by which he has established this other benefit. Which has this effect, that those who doubt whether it be not more advantageous for them not to accept the Inheritance at all, even with the benefit of an Inventory, rather than to engage themselves therein, may determine themselves and take their final resolution after having deliberated thereon; and that they may likewise without deliberating accept the Succession with this benefit, which secures their own Estates, since they do not engage themselves for more than the value of the Goods. Thus, we may distinguish in this matter the right to deliberate, and that of using

the benefit of an Inventory, which shall be explained in the two first Sections of this Title; and in the third we shall explain the effects of the said Benefit.

[In England, all Executors and Administrators are allowed the benefit of an Inventory of course, and they are supposed to accept the Succession always under that benefit. So that if they do exhibit an Inventory upon Oath, they are no farther accountable than for what is contained in the said Inventory; unless the Creditors, or Legatees, can prove that there are more Goods belonging to the Succession, than what are set down in the Inventory; in which case the Executors or Administrators will be obliged to charge themselves therewith. But if they refuse to bring in an Inventory, when they are lawfully required so to do, they are chargeable with all the Debts and Legacies, altho' there should not be Effects sufficient to pay them. For in this case, the Law presumes that there is enough to pay every body, and that the Executor or Administrator doth fraudulently substract the same. Swinburn of Wills, Part 3^d, §. 17.]

SECT. I.

Of the Right to Deliberate.

The CONTENTS.

1. The Heir may deliberate.
2. He informs himself by the Inventory.
3. Curators named to the Succession while the Heir is deliberating.
4. Sale of things which are perishable.
5. Acquitting the charges that are pressing.
6. Alimony to the Children, during the time that they deliberate.
7. Many Heirs successively have each of them a Right to deliberate.
8. The Heir who dies while he is deliberating, transmits his Right to his Successors.

I.

THE Heir, or Executor, who being ignorant of the Charges of the Inheritance is afraid to engage himself therein, may take the time allowed by Law for deliberating, before he declares whether he will accept the Succession, or not^a.

^a Illud sciendum est nonnunquam semel, nonnunquam saepius diem ad deliberandum datum esse: dum pratori suadetur tempus quod primum aditus praestituerat, non suffecisse. *l. 3. ff. de jur. delib.* Ne quis nos putaverit antiquitatis penitus esse contemptores, indulgemus quidem (hæredibus) petere deliberationem, vel à nobis, vel à nostris iudicibus. Non tamen amplius ab imperiali quidem culmine uno anno à nostris vero iudicibus, novem mensibus. *l. ult. §. 13. in f. C. cod.*

By the Ordinance of 1667, in the Title of Delay: for deliberating, the Heir has three Months from the time that the Succession is open, to make the Inventory, and forty days thereafter to deliberate.

II.

2. He informs himself by the Inventory.

To put the Heir, or Executor, in a condition to deliberate, it is necessary that he should have the means of informing himself of the Goods and Charges of the Succession; and that he and all other persons concerned may have this information, the Judge directs an Inventory to be made of all the Deeds and Writings belonging to the Inheritance, which are communicated to them^b.

^b See the Texts quoted under the letter c, in the Preamble to this Title.

As it is only by the means of the Inventory that the Heir can come at this knowledge, the Ordinance cited on the foregoing Article has made provision accordingly, as has been already observed, by making the time allowed for deliberating to commence only after the Inventory is made.

III.

3. Curators named to the Succession, while the Heir is deliberating.

If during the time that the Heir is deliberating, there should fall out some Affair in which it should be necessary to commence a Suit for the preservation of some right belonging to the Inheritance, or to defend it against some claim or pretension, and that the matter could not admit of delay; it would be necessary to name a Curator to the Inheritance, in order to prosecute its Rights, and to defend it, until the Heir by accepting the Succession, may be in a capacity to act himself^c.

^c Dum deliberant hæredes instituti adire, bonis à prætoris curator datur. l. 2. ff. de curat. fur. See the fifteenth Article of the first Section of Curators.

Seeing the time allowed to the Heir for deliberating is much shorter by the Ordinance quoted on the first Article, than it was by the Roman Law, and that the delay for deliberating runs only from the time that the Inventory has been made; we must understand what is said in this and the following Articles, not only of what happens during the delay for deliberating after the Inventory is made, but likewise of the time that the Inventory is making, and before it be set about.

IV.

4. Sale of things which are perishable.

If in the same case when the Heir delays to accept the Succession, or to renounce it, there be Goods belonging to the Inheritance, which by being kept are in hazard of perishing, or being damaged, or diminishing in their value, such as Fruit, Grain, Liquors, or things, which it would be more advantageous to sell than to keep, such as Horses or other Beasts that are not necessary, and which would occasion an Expence; the Heir, or Curator of the Succession might sell and dispose of those kinds of things, in order to preserve the Money that is got for them in the In-

heritance, observing in the said Sales the forms prescribed in such cases^d.

^d Si major sit hereditas, & deliberat hæres, & res sunt in hereditate quæ ex tractu temporis deteriores fiunt, adito prætoris, potest is qui deliberat, sine præjudicio, eas justis pretiis vendere: qui possit etiam ea quæ nimium sumptuosa sint, veluti jumenta aut vehitalia, item ea quæ mora deteriora fiant, vendere. l. 5. §. 1. ff. de jure delib.

These Sales are made by Court or Auction, and by permission of the Judge; unless it be that the inconsiderableness of the things that are sold, and the consent of the parties interested, may excuse the charges of these Formalities. See the following Article.

V.

If there were any debts due from the Succession, which it might be necessary to pay off speedily, the Monies arising from the Sales that are to be made, according to the Rule explained in the foregoing Article, should be employed for that purpose, or things which are the least necessary might be sold, or Debts that are owing to the Estate might be called in, in order to clear off the said Demands, or to satisfy the other Expences that are equally necessary, such as the Funeral Charges, the Tillage of the Lands, necessary Repairs, and others of the like nature, according as the Judge should direct^e.

^e Igitur siquidem in hereditate sit vinum, oleum, frumentum, numerata pecunia: inde fieri debent impendia: si minus à debitoribus hereditatis exigenda pecunia. Quod si nulli sunt debitores, aut judicem provocent, venire debent res supervacuas. l. 6. ff. de jure delib.

In cause ergo cognitione hoc vertetur, an justa causa sit, ut diminueret prætor permittat. Ergo & funeris causa deminui permittet: item eorum quæ sine piaculo non possunt præteriri: vescendi gratia æque deminui permittet. Sed & ubi urget ex aliis quoque causis permittere eum oportet. Ut ædificia succiantur, ne agri inculti sint, si qua pecunia sub poena debetur, ut restituantur; ne pignora distrahan- tur. Ex aliis quoque justis causis prætor aditus deminutionem permittet. Neque enim sine permisso ejus debet deminutio fieri. l. 7. in f. eod. d. l. 7. in princip. l. 5. §. 1. in f. eod.

VI.

If the Heirs are Infants who deliberate concerning the Inheritance of their Father, Mother, or other Ascendant, and they have no other means of Subsistence during the time that they have for deliberating, they may in the mean while obtain from the Judge a moderate Provision out of the Goods of the Succession for their Maintenance^f. For there is less inconvenience in taking a Provision of this nature out of the Estate, altho' the Children should renounce the Succession, than there would be in depriving them of it during the delay which the Law allows them. And if it should happen

6. Alimony to the Children during the time that they deliberate.

happen to be in the case of a Succession of a Father, on which the Children should have some demand in right of their Mother, who is already deceased, this Provision being deducted out of their demands would still admit of less difficulty.

^f Filius dum deliberat alimenta habere debet ex hereditate. l. 9. ff. de jur. delib. Ut ex iisdem (bonis) si aliqua alia facultas esse non poterit, tantum litis sumptus & alimonie homini subministretur, quantum moderato iudicis arbitrio fuerit aestimatum. l. ult. C. de ord. cogn. V. l. 51. ff. de hered. per.

Altho' these words of the second text quoted on this Article, and the fifty first Law, ff. de hered. per. relate to other matters, yet we may apply here that which concerns the moderating of these sorts of Provisions, the Equity whereof is founded on the necessity of maintaining the Children; but which ought to be as little burdensome to the Creditors as is possible.

We must observe upon this Article, that the Provisions mentioned therein have fewer inconveniences according to the present Usage in France, than they had in the Roman Law, by which the time for deliberating was much longer. See the Remark upon the first Article.

VII.

7. Many Heirs successively have each of them a right to deliberate.

If several persons were called to the same Succession, one in default of the other, as if a Testator having instituted an Heir, and foreseen the case, either that the said Heir should die before him, or that he would not accept the Succession, had substituted another in his place: or that the Testamentary Heir, or the Heir to an Intestate, renouncing the Succession, the next in degree of Kindred should be willing to accept it; in all these cases the Heir, who is called to the Succession in default of another, would have the same right to deliberate, as he had in whole place he succeeds. For the time granted for deliberating cannot begin to run with respect to each Heir, but after that he is called to the Succession.

^g Si plures gradus sint heredum institutorum, per singulos observaturum se, ait prator id quod prefiniendo tempore deliberationis edidit. Videlicet, ut a primo quoque ad sequentem translata hereditate, quam primum inveniat successorem, qui possit defuncti creditoribus respondere. l. 10. ff. de jur. delib. See the Title of vulgar Substitutions.

We must not confound the condition of him who succeeds to an Heir, purely and simply as his Heir, with the condition of Heirs who are substituted one to the other, or who take the place of a first Heir, to succeed in his default. For whereas these have the right to deliberate whether they shall accept the same Inheritance in the same manner as the Heir had, in whose place they succeed; he who becomes pure and simple Heir to another who had accepted the Inheritance, has not right to deliberate, whether he shall accept that Inheritance or not; but it goes to him with the same Engagements which the person was under who had accepted it, and to whom he succeeds.

VIII.

If the Heir who was deliberating happens to die before he has declared his mind, he transmits his Right to his Heir, or Executor, who may deliberate likewise whether he shall accept, or refuse the Succession that was fallen to the deceased ^h.

^b Sancimus si quis vel ex testamento, vel ab intestato vocatus deliberationem meruerit: vel si hoc quidem non fecerit, non tamen successionem renuntiaverit, ut ex hac causa deliberare videatur: sed nec aliquid gesserit, quod aditionem, vel pro herede gestionem inducat, prædictum arbitrium in successionem suam transmittat. l. 19. C. de jur. delib. See concerning this Right of Transmission the tenth Section of Testaments.

S E C T. II.

How one becomes Heir or Executor with the benefit of an Inventory.

The CONTENTS.

1. One may become Heir, with the benefit of an Inventory, without deliberating.
2. The Inventory ought to be made according to form.
3. It ought to take in all the Goods.
4. The omissions may be supplied.
5. Punishment of diverting the Effects.

I.

EVERY Heir, or Executor, who doubts whether the Succession be advantageous, or not, and who is afraid to engage himself in it, may before hand demand that an Inventory be made of the Effects, and of the Deeds and Writings belonging to the Inheritance; and without taking time to deliberate, he may declare that he accepts the Succession with the benefit of an Inventory. And by this means he will be liable for the Debts and Charges of the Inheritance, only in so far as the Goods belonging to the Deceased shall be sufficient to acquit them, and his own Estate will not be chargeable therewith ⁱ.

ⁱ Sin autem dubius est, utrumne admittenda sit, necne defuncti hereditas, non putet sibi esse necessariam deliberationem: sed adeat hereditatem, vel sese immisceat: omni tamen modo inventarium ab ipso conficiatur. l. ult. §. 2. C. de jur. deliber. Ut in tantum hereditariis creditoribus teneantur, in quantum res substantiæ ad eos devolutæ valeant. d. l. §. 4. Et nihil ex sua substantia penitus heredes amittant, ne dum lucrum facere sperant, in damnum incident. d. §. 4.

II. The

II.

2. The Inventory ought to be made according to form.

The Creditors, the Legataries, and all other persons who have any claim on the Inheritance, having an interest in this Inventory, the Heir or Executor cannot make it by himself, but it ought to be made by a publick Officer, and according to the form which the Law and Usage have established in this matter^b.

^b Hoc inventarium— modis omnibus impleatur sub presentia tabulariorum, cæterorumque qui ad hujusmodi confectionem necessarii sunt. l. ult. §. 2. C. de jur. delib.

According to the Usage received in France, the Inventory ought to be made by Authority of Justice, after having sealed up the places where the Writings, and other effects belonging to the Inheritance are kept.

III.

3. It ought to take in all the Goods.

This Inventory ought to contain all the Goods of the Succession that were sealed up by Order of the Judge, or are discovered by persons who have any knowledge thereof. And the Heir or Executor ought likewise to declare what he knows of them, and to swear that he does not detain or conceal any effects belonging to the Inheritance^c.

^c Subscriptionem supponere heredem necesse est, significantem & quantitatem rerum. Et quod nulla malignitate circa eas ab eo facta, vel facienda, res apud eum remaneant. l. ult. §. 2. C. de jur. delib.

By the usage in France, not only is the Heir obliged to give in a declaration upon Oath, but likewise the Servants of the deceased, are obliged to declare upon Oath what they know, touching the effects of the deceased.

IV.

4. The omissions may be supplied.

If the Creditors, or Legataries, and other persons concerned should discover that things have been omitted in the Inventory, or should any ways mistrust it, they will be admitted to prove the omissions and frauds which they shall alledge^d.

^d Licentia danda creditoribus, seu legatariis, vel fideicommissariis, si majorem putaverint esse substantiam a defuncto derelictam quam hæres in inventario scripsit, quibus voluerint legitimis modis quod superfluum est approbare. l. ult. §. 10. C. de jur. delib. Ut undique veritate exquisita, neque lucrum, neque damnum aliquod hæres ex hujusmodi sentiat hereditate. d. §.

V.

5. Punishment of conveying the Effects.

If the Heir or Executor had secretly conveyed away any of the effects belonging to the Succession, or failed to discover what he knew thereof, this unfair dealing would be punished in such a manner as the quality of the fact might deserve according to the circumstances^e.

^e Illo videlicet observando ut si ex hereditate aliquid hæres furripuerint, vel celaverint, vel amovendum curaverint, postquam fuerint convicti, in duplum hoc restituere, vel hereditatis quantitati computare, compellantur. l. ult. §. 10. in f. C. de jur. delib.

This penalty of the double is not in use in France; but the Heir who should be found guilty of such unfair practices, would be proceeded against according to the circumstances. And if they should appear to be such as to render the Heir unworthy of the benefit of an Inventory, he might be debarred of it.

S E C T. III.

Of the effects of the Benefit of an Inventory.

The CONTENTS.

1. The Heir with the benefit of an Inventory is bound only for the value of the Goods.
2. The Legacies are reduced according to the Goods.
3. The Heir who is a Creditor preserves his debt.
4. And recovers his Expences.
5. He ought to sell the Moveables.
6. He is only bound to render an account.
7. He is not obliged in paying the Creditors, to observe their order.
8. He may pay off the Legataries, if the Creditors do not appear.
9. The Lands which are given in payment, remain subject to the Mortgages.

I.

HE who having got an Inventory made according to form, declares himself Heir with the benefit of an Inventory, will not be liable for the Charges of the Succession but in so far as the value of the Goods belonging to the deceased amounts to, and his own Estate will not be any ways chargeable therewith^a, as has been said in the first Article of the second Section.

^a In tantum hereditariis creditoribus teneantur, in quantum res substantiæ ad eos devolutæ valeant. l. ult. §. 4. C. de jur. delib. Et nihil ex sua substantia penitus hæres amittant, ne dum licrum facere sperant, in damnum incidant. d. §. 4.

II.

If the Heir or Executor who has the benefit of an Inventory, was burdened with Legacies exceeding the sum which one is allowed to dispose of by Will^b, he might get them to be reduced in proportion to the Goods which remain clear, after the Debts and other Charges are deducted^c.

^b See

^b See the third Title of the fourth Book.

^c Hereditatem sine periculo habeant, & legis falcidia adversus legatarios utantur beneficio. l. ult. §. 4. C. de jur. delib. Bona intelliguntur cujusque quæ deducto ære alieno supersunt. l. 39. §. 1. ff. de verb. signif.

III.

3. The Heir who is a Creditor preserves his Debt.

If this Heir, who has the benefit of an Inventory, was himself a Creditor to the deceased, his quality of Creditor shall not be confounded with the quality of Heir, which makes him Debtor to himself; but he shall preserve his right whole and intire, in the same manner as the other Creditors, and that with the Mortgages and Privileges which he had for the security of his Debt.^d

^d Si verò & ipse aliquas contra defunctum habeat actiones non hæc confundantur, sed similem cum aliis creditoribus habeat fortunam: temporum tamen prærogativa inter creditores servanda. l. ult. §. 9. in f. C. de jur. delib.

IV.

4. And recovers his Expenses.

All the Expenses which the Heir who has the benefit of an Inventory has been at, whether it be for the Funeral of the deceased, for making the Inventory, or for Repairs, and all other necessary charges, shall be allowed him out of the Goods of the Inheritance which he shall have received^e.

^e In computatione autem patrimonii damus ei licentiam excipere, & retinere quicquid in funus expendit, vel in testamenti insinuationem, vel in inventarii confectionem, vel in alias necessarias causas hereditatis approbaverit sese perfolvisse. l. ult. §. 9. C. de jur. delib.

V.

5. He ought to sell the Moveables.

The Heir who has the benefit of an Inventory, not being bound to discharge the Debts but with the Goods of the Inheritance, he ought to sell the Moveables, as the readiest means for paying off the Debts^f.

^f See the Text quoted on the fourth Article of the first Section.

This Sale ought to be made after the Publications which are necessary for bringing in many Buyers, and for preventing the frauds which are usual in private Sales. And it is so order'd by some Customs in France.

VI.

6. He is only bound to render an Account.

When the Heir shall pretend that the Goods of the Succession are exhausted in paying the Debts, Legacies and other Charges, he shall be under no farther obligation to those who have any Claim on the Goods of the Succession, than to give an Accompt of them, in which he is to charge himself with the Goods according to the Inventory, and to put down in his discharge, all the Debts

and other Charges which he has acquitted^g.

^g In tantum hereditariis creditoribus teneantur, in quantum res substantiæ ad eos devolutæ valeant. l. ult. §. 4. C. de jur. delib.

It is only by an Accompt, that the Heir who has the benefit of an Inventory can show that he has employed the Goods for paying the Debts, and clearing the other Charges.

VII.

Altho' the Goods of the Succession be not sufficient to acquit all the Charges, yet the Heir, or Executor, who has the benefit of an Inventory, may pay off the Creditors who come first to demand their debts, if there be no Attachment of the Goods, or other hindrance on the part of the other Creditors. For he is not bound to know who are the Creditors, nor in what Order they are ranked. And those who come after all the Goods of the Succession are disposed of to other Creditors, ought to blame themselves for their delay^h.

^h Eis satisfaciatur qui primi veniant creditores. Et si nihil reliquum est posteriores venientes repellantur. l. ult. §. 4. C. de jur. delib.

[By the Law, in England, an Executor or Administrator, is obliged at his peril, in the payment of the Debts of the deceased, to observe the legal Order and Rank which the respective Creditors have for preference of their Debts before others. The Order which the Law has established among Creditors is after this manner. The Debts due to the Crown are to have the first place of precedence. Next to the Debts of the Crown, are Judgments, or Debts recovered against the Testator in a Court of Record, to have priority or precedence in payment, as being of a higher nature, or more dignity, than any other. And next unto Debts by Judgment, are those by Recognizance, or by Statute Staple, or Statute Merchant, to be regarded by the Executor or Administrator. Which Statutes and Recognizances, altho' they make Debts upon record, yet they are accounted to be of a lower nature and less dignity than Judgments, because they are begotten but by voluntary consent of parties; whereas in every Judgment there hath been a course and work of Justice against the Will of the Defendant, as is presumed, and this in a Court of Justice, and the Records of such Judgments are entered in public Rolls. The Debts which are to be discharged in the next place, are those which are due by Specialty or Obligation. And in the last place come the Debts without Specialty or Writing. The Executor or Administrator observing this Order established by Law among the Creditors for the preference of their several Debts, may pay what Creditors he pleases first. Swinburn of Wills, Part 6. §. 16. Wentworth's Office of an Executor, chap. 12.]

VIII.

If the Creditors do not appear, the Heir or Executor may pay off the Legacies. But if there should not remain Effects enough to satisfy the Creditors, they may oblige the Legataries to give back what they have received. For the Legacies are due only after the Debts are paidⁱ. And in such a case, greater regard ought to be had to the interest of

7. He is not obliged in paying the Creditors, to observe their Order.

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8. He may pay off the Legataries, if the Creditors do not appear.

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of the Creditors, which is not to lose what is justly due to them, than to the interest of the Legataries, which consists only in reaping a Benefit which is to be taken only out of the Goods of the Succession that shall remain clear after payment of all the debts¹.

¹ Sed et si legatarii interea venerint, eis satisfaciatur ex hereditate defuncti, vel ex ipsius rebus, vel ex earum forsitan venditione. l. ult. §. 4. in f. C. de jur. delib.

Sin verò creditores, qui post emensum patrimonium nec dum completi sunt, superveniant, neque ipsum heredem inquietare concedantur, neque eos qui ab eo comparaverint, res quarum pretia in legata, vel fideicommissa, vel alios creditores processerunt. Licentia creditoribus non deneganda adversus legatarios venire, vel hypothecis, vel indebiti conditione uti, & hæc quæ acceperint recuperare. Cum satis absurdum sit creditoribus quidem jus suum persequentibus legitimum auxilium denegari, legatariis verò qui pro lucro certant, suas partes leges accommodare. d. l. ult. §. 5.

¹ In re obscura melius est favere repetitioni, quam adventitio lucro. l. 41. §. 1. ff. de reg. jur.

It is hardly possible, according to the Usage in France, that it should happen that an Heir should pay off Legacies before the Debts. For the benefit of an Inventory is made publick, both by its being entered in the Acts of Court, and by the publick Notice that is given before the Sale of the Moveables, as has been observed on the fifth Article. But it may so happen that some Creditor may have been hindered from bringing in his claim, either by reason of his absence, or for some other cause, which ought not to be of prejudice to the Heir, who paid the Legacies honestly and fairly without any intent to defraud the Creditors.

IX.

§. The Lands which are given in payment remain subject to the Mortgage.

If any Creditors had taken in payment Lands or Tenements which were part of the Succession, and that other prior Creditors should happen to appear afterwards; they might exercise their Right of Mortgage, if they had any, on the said Lands or Tenements which had been given to the other Creditors: and the Heir who had the benefit of an Inventory would not be bound either in Warranty to those who had taken the said Lands or Tenements in payment, nor for what the other Creditors may come short of in the payment of their debts, farther than to the value of the Goods of the Succession which may remain in their hands^m.

^m Sin verò hæredes res hereditarias creditoribus hereditariis, pro debito dederint in Mutuum, vel per dationem pecuniarum satis eis fecerint, liceat aliis creditoribus qui ex anterioribus veniunt hypothecis, adversus eos venire, & à posterioribus creditoribus secundum leges eas abstrahere: vel per hypothecariam actionem, vel per conditionem ex lege, nisi voluerint debitum eis offerre. Contra ipsum tamen heredem (secundum quod sæpius dictum est) qui quantitatem rerum hereditariarum expendit, nihil actio extendatur. l. ult. §. 6. & 7. C. de jur. delib.

TITLE III.

In what manner a SUCCESSION is acquired, and how it is renounced.

THE Reader sees plainly, that these words of this Title, *in what manner a Succession is acquired*, do not regard the manner in which one is called to the quality of Heir or Executor: for it has already been sufficiently explained, that one is made Heir, either by the disposition of the Testator, or by the Provision of the Law; but they have respect only to the manner in which he to whom a Succession is fallen, whether it be by Testament, or as Next of Kin to an Intestate, and who has as yet done no act whereby he accepts that quality, may declare himself Heir, if he will make use of his Right, and acquire the Goods of the Succession. And these other words which follow, *how it is renounced*, are to be understood of the ways by which he who is called to be Heir or Executor may signify his refusal of it. For he may either accept of that quality, or renounce it. And since he may explain himself by several ways, and that he may likewise do some acts which would make him Heir, or Executor, altho' he should have no such intention; the different ways in which an Heir, or Executor may carry himself with respect to the Succession that is fallen to him, whether it be in accepting or renouncing it, shall be the subject matter of this Title. And in the first Section we shall explain the acts which engage one in the quality of Heir, or Executor, and which imply the entry to, or acceptance of the Succession. In the second we shall shew what are the acts which may have some relation to the quality of Heir, or Executor, without engaging one in it. The third shall be concerning the effects and consequences of the acceptance of the Inheritance. And in the fourth we shall explain what belongs to the Renunciation of the Inheritance.

SECT. I.

Of the Acts which engage one in the quality of Heir or Executor.

The CONTENTS.

1. In what the engagement to the Succession consists.
2. One may accept the Succession either by express acts, or otherwise.
3. What are the Acts of an Heir.
4. The Heir who in that quality receives payment of a debt, acts as Heir.
5. And if he pays a debt of the Succession.
6. If he takes any of the Goods, or reaps the Fruits.
7. Altho' he errs in the fact.
8. He who disposes of the Inheritance, makes himself Heir.
9. As also he who receives a Sum of Money to renounce it.
10. And also the Executor who renounces by collusion with the Heir of Blood.
11. And likewise he who has imbezzled any of the effects.
12. If he imbezzles after having renounced, he is guilty of Theft.
13. The Next of Kin being instituted by Testament, cannot stick to the Legal Succession, in prejudice of the Legatees.
14. A Minor is relieved against any act he has done as Heir.
15. If the Minor who is relieved has for his Co-heir one that is of Age, the said Co-heir remains nevertheless Heir.
16. We must add to the foregoing Rules, those of the following Section.

I.

1. In what the engagement to the Succession consists.

THE Engagement in the quality of Heir, or Executor, ought to have the same effect, as if the Heir or Executor had treated with the deceased to whom he succeeds, as has been said in its proper place; and it is the same thing in effect as if it had been agreed between them, that if the Heir, or Executor would accept that quality, he should have all the Goods of the Succession, and should likewise be bound to acquit all the charges^a. Thus, in order to judge by the acts of the Heir, whether they engage him in this quality or not, we ought to consider in them the relation which they may have to this

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intention of the deceased, that the Heir by taking the Goods should subject himself to all the Charges. And according as his Conduct shall shew that he is willing to fulfil the said intention of the deceased, it will prove his engagement, as shall be explained by the Rules which follow.

^a See the eighth Article of the first Section of the first Title.

This kind of Treaty between the deceased and his Heir or Executor, is made on the part of the deceased in his Testament, when there is one, and on the Executor's part in the moment that he accepts the Succession. For the Testator explains in his Testament his intention to leave his Goods to his Executor, on condition that he shall satisfy all the Charges; and the Executor, by accepting the Succession, does the same thing as if he subscribed to this condition in the Will. And when there is no Testament, the Engagement is nevertheless the same. For the Law which gives the Succession, imposes on the Heir that is to succeed to it, the same condition of acquitting the Charges. So that in this case, the Heir receiving the Succession from the Law, obliges himself in the same manner.

We may apply to this Engagement of the Heir, or Executor, to the Charges which are imposed upon him by the deceased, the Usage of the ancient Roman Law, by which Testaments were made by an imaginary Sale, which the deceased made to his Heir. See the remark on the thirty first Article of the second Section of Heirs and Executors in general.

II.

According to this first Rule, we must distinguish two sorts of acts which may form the engagement of the Heir to acquit the Charges of the Succession; those which signify expressly his intention to take the Goods, and to engage himself for all the Charges, as if he declares that he accepts the Succession^b; and those which have the same effect altho' he do not explain himself; as if he takes possession of the Goods of the Inheritance, or if he does some other act which shews that his design is to have the Goods^c.

^b An admiserit hereditatem, vel bonorum possessionem. l. 4. C. unde legitim. & unde cognat.

^c Si avia tua patrem tuum ex duabus uncis scriptis heredem, ex sola animi destinatione pater tuus heres fieri poterat. l. 6. C. de jure delib. See the following Articles.

III.

All the acts which an Heir may do in that quality, that is, acting as Heir, oblige him as such, whether it be that he does that which he cannot do but as Heir, or that the act which he does denotes his willingness to be Heir. The meaning and use of this Rule will better appear from the Articles which follow^d.

^d See the following Articles.

3. What are the acts of an Heir.

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IV. The

IV.

4. *The Heir who in that quality receives payment of a debt, acts as Heir.* The Heir who receives that which he has no right to receive but in that quality, does an act which properly belongs to the Heir^e. As if he receives payment from one that is Debtor to the Inheritance; for by receiving it, he declares his intention to make use of his Right of Heir.

* Tunc pro hærede geri dicendum esse ait, quoties accipit quod citra nomen & jus hæredis accipere non poterat. l. 20. §. 4. in f. ff. de acquir. vel omitt. hæred.

V.

5. *And if he pays a debt of the Succession.* If the Heir makes payment of a debt to one of the Creditors of the Succession, he thereby declares that he accepts the Succession; and engages himself to acquit the charges^f, since he acknowledges himself to owe what he pays, and which he does not owe but as Heir.

* Cum debitum paternum te exolvisse alleges pro portione hæreditaria, agnovisse te hæreditatem defuncti non ambigitur. l. 2. C. de jure delib. Agnovit judicium defuncti, eo quod debitum paternum pro hæreditaria parte persolvit. l. 8. C. de inoff. test.

VI.

6. *If he takes any of the Goods, or reaps the Fruits.* If he who is called to an Inheritance takes any of the Goods belonging to it after that it is open, as if he reaps the fruits of any Ground, if he cultivates it, if he farms it out, if he takes any of the Moveables of the Succession, if he sells them, or disposes otherwise of them, and in general, if he takes that which he had no right to take but as Heir, or if he disposes of any of the Goods of the Succession as Master and Owner, he makes himself thereby Heir^g.

* Pro hærede autem gerere quis videtur, si rebus hæreditariis tanquam hæres utatur, vel vendendo res hæreditarias, vel prædia colendo, locandove, & quoquo modo voluntatem suam declarat vel re, vel verbo de adeunda hæreditate. §. 7. inst. de hæred. qual. & diff. Pro hærede enim gerere est pro domino gerere. Veteres enim hæredes pro dominis appellabant. d. §. See the Text quoted on the fourth Article.

VII.

7. *Altho' he errs in the fact.* The Heir, who has taken possession of some particular thing which was not part of the Succession, but which he by mistake thought did belong to it, does even in that an act of Heir. For he declares his intention to accept of that quality, and by that means obliges himself to it^h.

^h Gerit pro hærede qui animo agnoscit succes-

sionem. Licet nihil attingat hæreditarium. Unde & si domum pignori datam, sicut hæreditariam retinuit, ejus possessio qualis qualis fuit in hæreditate, pro hærede gerere videtur. Idemque est & si alienam rem ut hæreditariam possedisset. l. 88. ff. de acquir. vel omitt. hæred.

VIII.

The Heir who even before he intermeddles any way with the Inheritance, sells it, or gives it to another, or disposes of it otherwise, makes himself Heir, and remains bound for all the Chargesⁱ self Heir, in the same manner as if he had accepted the Succession. For to sell or dispose of it is to make use of it as Masterⁱ.

ⁱ Quamvis hæres institutus hæreditatem venderit, tamen legata & fideicommissa ab eo peti possunt. Et quod eo nomine datum fuerit, venditor ab emptore vel fidejussoribus ejus petere poterit. l. 2. C. de legat. See the eighteenth Article of the first Section of Heirs and Executors in general.

Altho' the Text quoted on this Article, speaks only of him who has sold the Inheritance, yet the disposing of it in any other manner has the same effect.

IX.

If he who was called to a Succession receives a Sum of Money, or any other thing, to renounce it, and to let it go to the person who has right to succeed in his place; he does even by that Renunciation an act of Heir. For by receiving a price for the Succession, he sells it^j.

^j Licet pro hærede gerere non videatur qui pretio accepto prætermisit hæreditatem, tamen dandam in eum actionem, exemplo ejus qui omissa causa testamenti ab intestato possidet hæreditatem. Divus Hadrianus rescripsit. Proinde legatariis, & fideicommissariis tenebitur. l. 2. ff. si quis omitt. caus. testam. Si pecunia accepta hæres omisit aditionem, legata & fideicommissa præstare cogitur. l. 1. C. si omitt. sit. caus. test. See the foregoing Article, and the eighteenth Article of the first Section of Heirs and Executors in general.

X.

If the Testamentary Heir colluding with the Heir of Blood, had renounced the Succession in order to leave the Estate to him, and that even without any valuable consideration, both of them designing by this fraud to render the Testament altogether ineffectual; he would nevertheless be bound to pay the Legacies and other Charges. For this collusion would be in a manner a disposal of the Inheritance, and his knavery would deserve this just punishment^m.

^m Si quis per fraudem omiserit hæreditatem; ut ad legitimum perveniat, legatorum petitione tenebitur. l. 1. §. ult. ff. si quis omitt. caus. test. ab int. vel al. m. p. 6.

The Heir of Blood is likewise bound for the Legacies in this case. As to which the Reader may consult the eighteenth and nineteenth Articles of the third Section of Testaments, and the remarks which are there made on them.

XI.

1. And
wise he
has
embezzled
of the
effects.

If a Son, or other Heir to the deceased, who should pretend to abstain from the Inheritance, had imbezzled any of the Effects belonging to it, he would have by that means engaged himself to the Charges: For his condition ought not to be any better for having subtracted the Effects knavishly, than if he had taken as Heir that which he has imbezzled in this mannerⁿ.

ⁿ Si quis suus se dicit retinere hereditatem nolle, aliquid autem ex hereditate amoverit, abstinenti beneficium non habebit. l. 71. §. 4. ff. de acquir. vel omitt. hered.

XII.

2. If he
embezzles
or having
renoun-
d, he is
illy of
test.

It would not be the same thing in the Heir or Executor, who after he has renounced the Inheritance, should imbezzle or purloin any of the Effects belonging to it. For he would not by this act render himself Heir, unless the circumstances were such as that it ought to have this effect; but he would thereby commit a Theft, for which he would be punished^o.

^o Hæc verba edicti ad eum pertinent qui ante quid amovit, deinde se abstinet. Cæterum si ante se abstinuit, deinde tunc amovit, hoc videamus, an edicto locus sit. Magis est ut purem istic Sabini sententiam admittendam. Scilicet, ut furri potius actione creditoribus teneatur. Etenim qui semel se abstinuit, quemadmodum ex post delicto obligatur. l. 71. §. ult. ff. de acquir. vel omitt. hered.

XIII.

3. The
act of Em-
ing insti-
tuted by
statute,
must stick
the Le-
gal Success-
ion in pre-
dence of the
legates.

If the Testamentary Heir were the same person who had right to succeed to the Testator, if he had died intestate, and he thinking to avoid the payment of the Legacies and other Charges imposed by the Testament, should renounce the Testamentary Succession, and cleave to his right of succeeding to the deceased as dying Intestate, he would not by that be deprived of the Succession^p; but he would nevertheless be bound to execute the Testament. For the Testator might have named another person for his Heir or Executor, and he cannot have the Goods of the deceased, unless he executes his Will^q.

^p Hæres institutus idemque legitimus, si quasi institutus repudiaverit, quasi legitimus, non amittit hereditatem. l. 17. §. 1. ff. de acquir. vel omitt. hered.

^q Prætor voluntates defunctorum tueretur, & eorum calliditati occurreret qui omiſſa causa testamenti, ab intestato hereditatem, partemve ejus possident, ad hoc ut eo circumveniant, quibus quid ex judicio defuncti deberi potuit, si non ab intestato possideretur hereditas: & in eos actionem pollicetur. l. 1. ff. si quis omiſſ. caus. test. Quocumque enim modo

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hereditatem lucri facturus quis sit, legata præstabit. d. l. §. 9. in f. l. 3. C. si omiſſ. sit caus. test.

We must observe on this Rule, that in the Provinces of France which are governed by their Customs, if the Testator charges his Heir at Law with more than he has power to give away by the Custom, the said Heir may stick to his Right which belongs to him by the Custom, and get the dispositions of the Testament to be reduced in so far as they encroach on his Right. For the Testator could not dispose to his prejudice.

XIV.

The Heir who is a Minor cannot do any act of Heir which may engage him irrevocably to that quality. And if the Succession with which he has intermeddled proves to be burdensome, he is relieved from it^r.

14. A Mi-
nor is re-
lieved a-
gainst any
act he has
done as
Heir.

^r Minoribus vigintiquinque annis, si damnosam hereditatem parentis appetierint, ex generali edicto, quod est de minoribus vigintiquinque annis succurrit (Proconsul) cum etſi extranei damnosam hereditatem adierint, ex ea parte edicti in integrum eos restituit. l. 57. §. 1. ff. de acq. vel om. hered.

See the tenth and following Articles of the first Section of Rescissions and Restitutions of things to their former state. The Creditors can suffer no manner of inconvenience from a Minor's renouncing an Inheritance which he had accepted. For since there is always an Inventory made of the Goods when the Heir that succeeds is a Minor, the said Inventory preserves the Rights of the Creditors, and the Minor is as it were an Heir with the benefit of an Inventory.

XV.

If the Minor who renounces the Succession which he had already accepted, had a Co-heir of full age, who had likewise accepted the Inheritance for his portion; the said Co-heir will nevertheless remain Heir, after the Minor has renounced. But he will be liable to the charges only for his own portion, and will not be bound for those which fell to the share of the Minor; the Creditors preserving their Rights in order to prosecute them pursuant to the Rules which have been explained in the ninth Section of the first Title^s.

15. If the
Minor who
is relieved
has for his
Co-heir one
that is of
age, the said
Co-heir re-
mains ne-
vertheless
Heir.

^s Si minor annis posteaquam ex parte hæres extitit, in integrum restitutus est. D. Severus constituit, ut ejus partis onus cohæres suscipere non cogatur. Sed bonorum possessio creditoribus detur. l. 61. ff. de acquir. vel. omitt. hered. See the Remark on the foregoing Article.

XVI.

One may be able to judge by the Rules explained in this Section, and by the examples of the cases which have been here quoted, what are the acts which may engage one in the quality of Heir, or Executor. And it will be easy to apply to the particular facts which may happen, and to the circumstances, the use of these Rules, together with those which shall be explained in the following Section^t.

16. We must
add to the
foregoing
Rules those
of the fol-
lowing Sec-
tion.

LIII 2

This

¹ This Article is a consequence of the foregoing Articles, and of the following Section.

SECT. II.

Of the Acts which have some relation to the quality of Heir, or Executor, but which do not engage one in it.

THE CONTENTS.

1. To act as Heir, it is necessary that he who acts should know that he is such.
2. And that the act proceed from no other cause.
3. The Heir at Law who knows not that there is a Testament, does not approve it by declaring himself Heir.
4. We must distinguish the motives of the acts.
First Example.
5. Second Example.
6. Another Example.
7. When one is forced to act as Heir, it does not engage him.
8. Precaution to be taken by the Heir who is afraid lest he should engage himself by some act.

I.

¹ To act as Heir, it is necessary that he who acts should know that he is such. **T**HE acts which an Heir or Executor may chance to do, whilst he is ignorant of the death of the person to whom he succeeds, and when he acts upon other considerations, put him under no manner of engagement. For to act as Heir, it is necessary that the person who acts should know that he is such, and that the Succession is open, that is to say, that the person to whom he has a right to succeed is dead. Thus he who being presumptive Heir to a person that is absent, whether he be instituted by Testament, or has a right to succeed in case the said person dies Intestate, took care of his affairs during his absence, and continues to take the same care after his death, before he knows any thing of his death, does not engage himself to the Inheritance. And he would be as little engaged, if he were ignorant that he was Heir, altho' he knew of the death of the said person².

² Qui hereditatem adire, vel bonorum possessionem petere volet, certus esse debet defunctum esse testatorem. l. 19. ff. de acquir. vel omit. hered. Neminem pro herede gerere posse, vivo eo cujus in bonis gerendum sit, Labro ait. l. 27. cod.

II.

It may so happen that an Heir, or Executor, who knows of the death of the person to whom he is to succeed, may do some acts which in their own nature would be reckoned acts of the Heir, but which by the circumstances are to be distinguished from them. Thus, for instance, if a Son who was living in a House which his Father had given him the use of during pleasure, continues to dwell in it for some time after his Father's death, without declaring his mind, whether he will be Heir to his Father, or not; this possession which he has of the House, will not be a sufficient reason for concluding that it is as Master and Owner of the House that he has continued to live in it since his Father's death; and it will be no hindrance to him why he may not renounce the Inheritance, if nothing else has engaged him in it. For altho' his precarious Title was at an end by his Father's death, yet this bare detention of a House, which is part of the Inheritance, having no relation to the quality of Heir, would oblige him only to pay the Rent of the House to him who shall succeed as Heir, or to the Creditors of the Inheritance^b.

^b Si paterna hereditate te abstinuisse constiterit, & non ut heredem in domo, sed ut inquilinum, vel custodem, vel ex alia justa ratione habitasse, liquidum fuerit probatum, ex persona patris conveniri te procurator meus prohibebit. l. 1. C. de repud. vel abst. hered.

Non hoc an tenuerit quis res hereditarias, necne, sine voluntate acquirendae sibi hereditatis, querendum est: sed an admiserit hereditatem, vel bonorum possessionem. l. 4. C. und. legit. & unde cognati.

We have in this Rule put the case of another House different from that wherein the Father of the said person lived, that we might speak only of the fact of the bare dwelling in a House belonging to the Inheritance, and to avoid the jumbling together other acts of an Heir, which this Son would be obliged to prevent, with respect to the Moveables and Papers which should happen to be in the House where the Father lived, if after his death the Son should continue to dwell in it. For by reason of the said Moveables and Papers, the Son would be obliged to get them speedily sealed up, in order to have an Inventory taken of them, unless he had a mind to enter Heir simply and purely, without the benefit of an Inventory. See in relation to what is said of a precarious Possession the second and thirteenth Articles of the first Section of the Loan of Things to be restored in Specie.

III.

It is not always enough to make an Heir liable to the charges of the Inheritance, that he does some act as Heir, even altho' he knows that he is Heir, and also that the person to whom he is to inherit is dead, if he is ignorant by what Title he is to succeed. Thus, for example,

ving him-
self Heir.

example, if one who had right to succeed to a person dying Intestate, is by the said person instituted his Heir by a Testament, and he knowing nothing of the said Testament, enters to the Succession as next of Kin, and that the Legataries should come afterwards and set up a Testament, which would engage him in such charges, that he would chuse rather to renounce the Inheritance than to keep it, he might abstain from it; and he would cease to be Heir in the same manner as one who is instituted by a Testament, and who believing it to be a good Will, and not being next of Kin, had entered to the Succession, of which he should happen to be afterwards deprived on account of the nullities which should be discovered in the said Testament^c.

^c Ut quis pro hærede gerendo obstringat se hæreditati, scire debet qua ex causa hæreditas ad eum pertineat, veluti agnatus proximus iusto testamento scriptus hæres, antequam tabulæ proferantur, cum existimaret intestato patremfamilias mortuum, quamvis omnia pro domino fecerit, hæres tamen non erit. Et idem juris erit, si non iusto testamento hæres scriptus, prolatis tabulis, cum putaret iustum esse quamvis omnia pro domino administraverit, hæreditatem tamen non acquirat. l. 22. ff. de acquir. vel omitt. hæred.

Altho' the Dispositions of Testaments which load the Heir too much may be reduced, as shall be shown in the third Title of the fourth Book, and in the fourth Title of the fifth Book; yet seeing there may be dispositions which are not subject to this Reduction, as shall be explained in the same places, and that other considerations, and even that of being engaged in Law-Suits about the said Reductions, may oblige the Testamentary Heir not to accept the conditions of the Testament, there may be cases where the Rule explained in this Article may have its use.

IV.

4. We must
distinguish
the motives
of the act.
First Ex-
ample.

Among the acts which an Heir or Executor may do, it is necessary to distinguish between those which can have no other cause besides an intention which implies the acceptance of the Inheritance, and those which may proceed from other causes, and from which it does not necessarily follow, that he who does them is Heir. Thus, what one does out of a motive of duty, as if the Son takes care to bury his Father, this office which he does to his deceased Parent is not reputed to be acting as Heir. Thus the Heir, who while he is deliberating whether he shall accept, or not, lays up the Effects of the Succession in safety, does not declare by that action that he is Heir. But in these and the like cases, it is by the quality of the acts, and the circumstances, that we distinguish what is to be looked upon as an acting as Heir, and what ought not to have that effect^d.

^d Pro hærede gerere videtur is, qui aliquid facit quasi hæres, & generatim Julianus scribit, eum deum pro hærede gerere, qui aliquid quasi hæres gerit. Pro hærede autem gerere, non esse facti, quam animi. Nam hoc animo esse debet, ut velit esse hæres. Cæterum si quid pietatis causa fecit, si quid quasi non hæres egit, sed quasi alio jure dominus, apparet non videri pro hærede gessisse. l. 20. ff. de acquir. vel omitt. hæred. Ut puta patrem sepelivit, vel iusta ei fecit: si animo hæredis, pro hærede gessit. Enimvero si pietatis causa hoc fecit, non videtur pro hærede gessisse. d. l. 20. §. 1. Aut si non ut hæres, sed ut custodiat: aut putavit sua: aut dum deliberat quid fecit consulens ut salvæ sint res hæreditariæ. Si forte ei non placuerit pro hærede gerere, apparet non videri pro hærede gessisse. d. §. 1. V. l. 4. ff. de relig. & sumpt. fun.

V.

The Heir who without any design of accepting this quality, but barely to prevent the loss or ruine of a thing belonging to the Inheritance, takes some care of it, or having some just reason to believe it to be his own, takes possession of it, does not thereby engage himself to be Heir, provided that the circumstances shew his intention and his integrity^e.

^e Si quid quasi non hæres egit, sed quasi alieno jure dominus, apparet non videri pro hærede gessisse. l. 20. ff. de acquir. vel omitt. hæred. Aut si non ut hæres, sed ut custodiat, aut putavit sua. d. l. §. 1.

VI.

If the Heir was in Partnership with the deceased, to whom he was to succeed, or if they had something in common together, and that this Partner who was instituted Heir exercising his Right, after the death of the other, to the thing which belonged to them in common, does it in such a manner as to restrain himself to his own proper Right without confounding it with the Right which belonged to the deceased, and which by the quality of Heir had accrued to him; those acts being confined to his own proper Right, will not be a sufficient ground to declare him Heir, no more than the care which he may have taken of the thing belonging to him in common with the deceased^f.

^f Duo fratres fuerant, bona communia habuerant: eorum alter intestato mortuus suum hæredem non reliquerat: frater qui supererat volebat ei hæres esse: consulebat, num ob eam rem quod communibus, cum sciret eum mortuum esse, usus esset, hæreditati se alligasset. Respondit, nisi eo consilio usus esset, quod vellet se hæredem esse, non astringi. Itaque cavere debet, ne qua in re plus sua parte dominationem interponeret. l. 78. ff. de acquir. vel omitt. hæred.

VII.

If it has happened that an Heir has been forced by any person to do some act,

act,

all as Heir act, which, if he had been at his own free liberty when he did it, would have made him Heir; the said force being well proved, would render the act of no effect, and he would nevertheless be admitted to renounce the Succession⁸.

⁸ Si metus causa adeat aliquis hereditatem, fiet ut quia invitatus heres existat, detur abstinendi facultas. l. 85. ff. de acquir. vel omitt. hered.

VIII.

8. *Precautions to be taken by the Heir, who is afraid lest he should engage himself by some act.* The Heir, or Executor, who should find himself under a necessity of doing some acts which he feared might be made use of to tie him down to the acceptance of that quality may beforehand declare his intention by some Instrument in Writing, wherein he may protest that what he does or shall do, shall be without taking upon him the quality of Heir, but barely either for preserving the Goods of the Succession, or for the other causes which may oblige him to act, and which he may specify in his Protest. And in this case, if what he has done appears to be sincere, the acts done pursuant to this Protest will do him no manner of prejudice. It is by the means of this precaution, that the Heirs who are not willing to engage themselves to accept the Succession, ought in such like cases to provide for their security^h.

^h Et ideo solent testari liberi qui necessarii existunt, non animo heredis se gerere quae gerunt, sed aut pietatis, aut custodiae causa, aut pro suo. l. 20. §. 1. ff. de acquir. vel omitt. hered. Plerique filii cum parentes suos funerant, vel alii qui haeredes fieri possunt, licet ex hoc ipso neque pro haerede geritio, neque aditio praesumitur: tamen, ne vel miscuisse se necessarii, vel caeteri pro haerede gerisse videantur, solent testari pietatis gratia facere se sepulturam. l. 14. §. 8. ff. de relig. & sumpt. fun.

SECT. III.

Of the effects and consequences of the Acceptance of the Inheritance.

The CONTENTS.

1. Two effects of the Acceptance, the Right to the Goods, and the Possession.
2. The Possession is not necessary to one's becoming Heir.
3. The Acceptance of the Succession is carried back to the time of the death which laid the Succession open.
4. Effect of the Acceptance, to oblige to pay all the Charges.

5. Another effect, the right of Transmitting the Inheritance.

6. In what sense the Acceptance regards the Goods which do not remain in the Inheritance.

I.

IT is necessary to distinguish two effects of the Acceptance of the Inheritance. One is, that which makes the Heir or Executor Master of all the Goods, and of all the Rights belonging to the Succession, altho' he be not yet in possession of them: and the other effect, which is a consequence of the former, is, that he may take possession of them. The Heir becomes Master of the Goods by a bare act, by which he declares, or signifies, that he is Heir, altho' as yet he possesses no part of the Inheritance^a. And he does not acquire the possession of the Goods, till he begins to possess them according to the Rules which have been explained in the Title of Possession.

^a Ex sola animi destinatione. l. 6. C. de jur. delib. See the second Article of the first Section.

Bonorum possessio admittitur, commoda & incommoda hereditaria, itemque dominium rerum quae in his bonis sunt, tribuit. Nam haec omnia bonis sunt conjuncta. l. 1. ff. de bonor. poss. See the following Article.

II.

As soon as the Heir, or Executor has done any act which engages him in that quality, whether he possesses the Goods of the Inheritance, or a part of them, or even altho' he has none of them in his possession, yet he may exercise the Rights belonging to the Heir or Executor, and he is likewise bound for all the Charges^b.

^b Gerit pro haerede qui animo agnoscit successionem, licet nihil attingat hereditarium. l. 88. ff. de acquir. vel omitt. hered.

III.

Seeing the Heir, or Executor, who accepts the Succession only some time after the death of the person to whom he succeeds, is reputed Heir, or Executor, from the moment of the said death, as has been said in another place^c; all the Goods which augment, and all the Charges which diminish the Inheritance after the said death, will fall to him. And whatever has been laid out for the preservation of the Goods, or acquitting of the Charges, whether it was by a Curator, if there was any, or by other persons, will be on his account^d.

count^d, unless he has good reasons for not approving the said disbursements.

^a See the fifteenth Article of the first Section of the first Title.

^d Omnis hereditas, quamvis postea adeatur, tamen cum tempore mortis continuatur. l. 138. de reg. jur. Illud quaesitum est, an heredi futuro servus hereditarius stipulari possit? Proculus negavit, quia is eo tempore extraneus est. Cassius respondit, posse: quia qui postea heres extiterit videretur ex mortis tempore defuncto successisse. l. 28. §. ult. ff. de stip. serv.

IV.

4. Effect of the Acceptance, to oblige to pay all the charges. The Heir who is of age, and who has once taken upon him that quality without the benefit of an Inventory, enters irrevocably into all the Engagements which are the consequences thereof^e.

^e See the ninth, tenth, eleventh, and twelfth Articles of the first Section of the first Title, and the sixth Section, and the other following Sections of the same Title.

V.

5. Another effect, the Right of transmitting the Inheritance. There is another effect of the Acceptance of the Succession, which is the Right that it gives to the Heir, or Executor, if he happens to die after this acceptance, to transmit or convey the Inheritance to his Heir, or Executor. This is that Right which is called the Right of Transmission of the Inheritance, which we shall treat of in its proper place^f. And it is enough here barely to mention it.

^f See the tenth Section of the Title of Testaments.

VI.

6. In what sense the Acceptance regards the Goods which do not remain in the Inheritance. Altho' the Acceptance of the Succession is limited to the Goods which remain therein after the death of the person to whom the Heir or Executor succeeds, and that it does not extend to those Goods to which the Right that the deceased had did determine by his death, as has been observed in another place^g; yet the Heir or Executor does nevertheless take possession of those sorts of Goods, whether it be to preserve them for the persons to whom they are to be restored, as if they were Goods substituted, or even to continue to reap the Fruits of them, according to the conditions of the Substitution. And he enters likewise into the Engagements which the deceased was under in relation to the said Goods. Thus, for example, if the deceased had damnified them, the Heir or Executor would be bound for the damages which the Owners had suffered, and for the charges of the said Goods which the deceased had failed to acquit during the time that he enjoyed them.

^g See the fifth Article of the first Section of Heirs and Executors in general.

S E C T. IV.

Of Renouncing the Inheritance.

The CONTENTS.

1. Every Heir may renounce the Succession.
2. How the Succession is renounced.
3. In order to renounce, it is necessary one should know his Right, and that the Succession be open.
4. The Heir who has renounced, cannot afterwards retract.
5. One cannot renounce the Inheritance in part.

I.

EVERY Heir or Executor, is at liberty to accept the Succession, or to abstain from it, and to renounce it; provided he has not done any act which may have engaged him in that quality^a.

^a Is qui heres institutus est, vel is cui legitima hereditas declarata est, repudiatione hereditatem amittit. l. 13. ff. de acq. vel amit. hered.

II.

The Heir, or Executor, who has a mind to renounce the Succession, may do it by acts which signify his intention so to do. Thus he might cause notice to be given to the Creditors, and to the Legataries, that he will not accept the Succession, and that he renounces it. He might likewise make such a declaration to the person who has the Right to succeed in his place. And this Renunciation ought to be made either judicially, or otherwise by some act intimated to the party, to whom notice ought to be given, and executed honestly and fairly^b.

^b Recusari hereditas non tantum verbis, sed etiam re potest: & alio quovis indicio voluntatis. l. 95. ff. de acq. vel amit. hered.

Seeing the Renunciation of the Succession may have consequences which make it necessary, that there should remain Proof of it, whether it be for the discharge of the Heir or Executor who renounces, or for the behoof of the person who has right to succeed in his default, or for the Interest of the Creditors; the Renunciation cannot be well done but by some Public Instrument in Writing, which may be known to all parties concerned.

III.

As in order to act as Heir or Executor, it is necessary that the Heir or Executor should know the death of the person

3. In order to renounce, it is necessary

say that one should know his Right, and that the Succession be open.

person to whom he is to succeed, and that he should know likewise that he is called to the Inheritance^c; so it is also necessary in order to renounce the Succession, that the Heir or Executor be not ignorant of the said death, nor of his own Right to succeed. For in order to renounce a Right, it is necessary that the person who renounces should have it in his power to acquire it^d, and know of it^e.

^c See the first Article of the second Section.

^d *Is potest repudiare, qui & acquirere potest. l. 18. ff. de acquir. vel omitt. poss. Nolle adire hereditatem non videtur qui non potest adire. l. 4. eod.*

^e *In repudianda hereditate, vel legato certus esse debet de suo jure is qui repudiat. l. 23. ff. de acq. vel omitt. hered.*

This Rule has no relation to the Renunciations of Daughters, of which mention has been made in the Preamble of the second Section of Heirs and Executors in general. For those Renunciations concern only Successions to come, and are founded on motives which render them lawful and honest, and consequently reasonable; whereas it would be uncrvil and unreasonable that an Heir should renounce a Succession, unless it were under the circumstances mentioned in the Article.

IV.

4. The Heir who has renounced, cannot afterwards retract.

Altho' the Renunciation of the Succession seems to have no other effect, but to free him who might be Heir or Executor from that quality, without obliging him to any thing; yet it has this effect, that he who has once renounced a Succession cannot afterwards claim it, if the person who had right to succeed in his default has taken his place. Thus the Heir who has renounced, has engaged himself to the other who succeeds in his place, to let him enjoy peaceably the Inheritance, whereof he has relinquished to him all the Effects, and the Charges^f.

^f *Si major quinque & viginti annis hereditatem fratris tui repudiasti, nulla tibi facultas ejus adeundae relinquitur. l. 1. C. de dolo.*

If the Heir who has renounced, should afterwards repent of it, whilst all things are yet entire, no other person having appeared to claim the Inheritance nothing would hinder him from resuming his Right.

[As to this matter of Renunciation, there is a difference to be made according to the Usage in England, between a Renunciation made by an Executor of a Will, when there are more Executors than one, and a Renunciation made by an Executor, when he is sole Executor. In the first case of many Executors, if one renounces, and the others take upon them the Execution of the Will, he who has renounced may at any time during the life of his Co-executors retract his Renunciation, and administer the Goods of the deceased jointly with his Co-executors. But after their death, it is too late for him to retract. And I take the reason of this to be, that the Law looks upon all the Executors to be only one and the same person representing the Testator, and that therefore while any of the Co-executors are alive, the Executor who has once renounced, is afterwards admitted to act in conjunction with them, as being one and the same person with them

†

by a Fiction of the Law. But in the case of one single Executor, if he renounces, and Administration with the Will annexed is granted to another person, then things not being any longer intire, he cannot afterwards retract his Renunciation, and take upon him the Executorship. Swinburn of Wills, Part 6. §. 3. Brook's Abridgment, Tit. Executor, Numb. 38. 117.]

V.

As the Heir or Executor cannot divide his acceptance of the Inheritance, to take one part of it, and leave the rest, as has been said in the fifth Article of the third Section; so neither can he divide his Renunciation, by relinquishing one part of the Inheritance, and keeping the remainder. But he ought either to renounce the whole Succession, or to keep it intire^g.

^g *Vel omnia admittantur, vel omnia repudientur. l. 20. C. de jure delib.*

TITLE IV.

Of PARTITIONS among CO-HEIRS.

IT is an Engagement which all persons are under who have any thing in common among them, to come to a Partition when any one of them desires it. For they may indeed all of them have the joint enjoyment of the Thing which belongs to them in common, if this undivided enjoyment thereof be agreeable to them, and suit with their convenience; but if any one of them is desirous to have his portion to himself, it would be contrary to justice and to good manners, to force him to have it always undivided, since that would be a perpetual occasion of strife and contention among them, as has been observed in another Title^h.

^h See the eleventh Article of the second Section of those who happen to have, &c.

As we have explained in the same place the mutual Engagements of those who have any thing in common together without a Covenant, so we have there set down the Rules which have relation to their engagement of dividing the common Thing, and the said Rules may be applied to Partitions among Co-heirs. But since we have not there explained this kind of Partition in particular, nor even in general the nature of Partition,

Partition, which is of greater extent among Co-heirs, than among all other persons; we shall explain in this Title all that belongs to this matter, both what has not been explained in that other Title, and what is necessary to be explained here.

If any Reader shall find fault, that we have not inserted under this Title that Rule of the Roman Law which relates to Partitions which Parents may make of their Goods amongst their Children, he may see what is said on this subject in the Preamble of the first Section of the Title of Testaments.

It is proper to acquaint the Reader here, that altho' it might be expected that we should explain under this Title the matter of Collation of Goods which the Co-heirs are bound to bring into the Mass of the Inheritance, in order to be comprized in the Partition; yet we shall not treat of it here. For this matter takes in a great many particulars which ought to be distinguished from the matter of Partitions, and it shall be explained in a separate Title by it self, which shall be the fourth of the second Book.

SECT. I.

Of the nature of Partition, and in what manner it is made.

The CONTENTS.

1. Definition of Partition.
2. Partition is as an Exchange.
3. Or as a Sale.
4. All the Goods of the Inheritance are divided.
5. And likewise all the Charges.
6. Warranty for Evictions, and for the Charges.
7. Equality of the condition of the Co-partners.
8. If the Equality cannot be exact, in what manner it is to be supplied.
9. What the deceased owed to the Heir, is reckoned part of the Charges.
10. The Goods which cannot be divided, are to be sold by Auction.
11. The Auction may be made publicly.
12. If the thing is adjudged to one of the Heirs, as being the highest bidder, the others cannot claim any share in it, by offering their share of the Price.
13. Where the Deeds belonging to the Succession are to be lodged.

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14. Who is the Plaintiff in a Demand of Partition.

15. A new Partition for an Heir who appears afterwards.

16. Wrong done in a Partition.

17. Three ways of making a Partition.

I.

THE Partition of the Goods of the Inheritance among Co-heirs, is nothing else but the exercise of the Right which they have all of them reciprocally, to take out of the Goods which belong to them in common, each of them one portion separated from the portions of the others, which is to be to him in lieu of the undivided share which he had in the whole^a. And it is the same thing in all other Partitions of a Thing which two or more persons have in common. For those who have any thing in common among them, cannot be compelled to possess it always jointly and in common. Thus, every one of the Co-heirs may oblige the rest to come to a Partition of the Inheritance^b.

^a Cohæredibus volentibus à communione discedere, necessarium videbatur aliquam actionem constitui qua inter eos res hæreditariæ distribuerentur. l. 1. ff. fam. erisc.

^b Bona quæcunque tibi sunt communia cum fratre tuo ex hæreditaria successione patris, vel matris, cum eodem familiæ eriscundæ judicio experiens, ut dividantur, impetrabis. l. 8. C. eod.

^c Arbitrium familiæ eriscundæ vel unus petere potest. Nam provocare apud judicem, vel unum hæredem posse palam est. Igitur & presentibus cæteris, & invitis, vel unum arbitrium poscere. l. 43. ff. fam. erisc. See the eleventh Article of the second Section of those who happen to have any thing, &c.

II.

It follows from this nature of Partition, that it is as it were an Exchange², which the parties who divide make among themselves; the one giving his right in the thing which he relinquishes, for the other's right in that which he takes to himself. Thus, for instance, when in a Partition among two Co-heirs, the one takes a certain Estate in Land for his share, the other a House, he who takes the Land retains the right which he himself had to the one half of it, and acquires the right which his Co-heirs had to the other half; and he who takes the House, retains in the same manner the right which he himself had to the one half of it, and acquires the other half which belonged to the other^c.

^c Permutatio rerum discernens communionem. l. 77. §. 18. ff. de legat. 2. Quasi certa lege permutationem

mutationem fecerint. l. 20. §. 3. in f. ff. fam. erisc.

III.

3. Or as a Sale.

The Partition being considered under another view, may be compared to the Contract of Sale. For altho' one of the Co-parceners does not buy any thing from the other; yet they estimate among themselves that which they are to divide, and every one of them takes a share of the Goods in proportion to the share which he had in the Price which they set upon all the Goods of the Inheritance^d.

^d Divisionem prædiorum vicem emptionis obtinere placuit. l. 1. C. comm. utruiq; judic. tam famil. q. c. d.

Seeing the Valuations which Co-heirs make among themselves of the Goods which they divide, are of no other use, but to facilitate the giving to every one of them so much of the Goods as they ought to have for their portion, this comparison of Partition to the Contract of Sale, is limited to the Idea which is given of it in this Article; and as it has not the other marks of this Contract, so it ought not to have the consequences thereof. Thus the Co-heirs who divide the Goods of the Inheritance, are not bound to pay the fines of Alienation, and the other dues which might be demanded in a Contract of Sale, not even as to the Monies which one of the Co-heirs may be obliged to pay in to his Co-heir to make their shares equal, which is called the Balance of the Partition. Which happens when it is not possible to divide all the Goods of the Succession in such a manner as to make all the portions equal, as when there are some Goods that cannot be divided, and which exceed the value of one share; or when it is altogether impossible to divide the Goods into equal portions without obliging the one to pay in some Money to the other, for rendering the shares equal. For in these cases there is this difference between the Money given for balancing the Shares, and the Price in a Sale, that in the Contract of Sale the Buyer had no right in the Thing that is sold, and he purchases it entirely by a Commerce, wherein he engages himself voluntarily. But in a Partition, he who pays in the Money had a Right in the whole Thing which he takes, and a Right which came to him by a Title independent of his Will. Thus he does not buy any thing, but being engaged to take for his Portion some of the Goods which are of greater value than what his share amounts to, he is obliged to make the condition of his Co-heir equal to his own. So that this return of Money being only an Accessory that is essential to the Partition, it does not change the nature of it, but becomes a part thereof, and does not give to the Partition the characters of a Contract of Sale, which are quite different.

IV.

4. All the Goods of the Inheritance are divided.

The Partition ought to take in all the Goods without exception, Moveables and Immoveables, Rents, Debts owing to the Estate, and in general all sorts of Effects whatsoever that are in the Succession, and which ought to go to the Heirs^e. We must likewise take in among the Goods that are to be divided, those which the Heirs, or any one of them are bound to bring into the Mass of the Inheritance, pursuant to the Rules which shall be explained in the

Title of Collation of Goods. But if after the Partition has been made, there should appear Goods which had not been comprized therein, it would be reformed, or a new Partition would be made either of the whole Estate, or only of those Goods which were omitted^f.

^e Per familiæ eriscundæ actionem dividitur hæreditas. l. 2. ff. famil. erisc. Judex familiæ eriscundæ nihil debet indivisum relinquere. l. 25. §. 20. cod.

^f Quod si quædam res indivise relictæ sunt, communi dividundo de his agi potest. l. 20. §. 4. ff. fam. erisc.

V.

As the Heirs divide all the Goods of the Inheritance which they know of, so they ought likewise to divide the Debts owing by the deceased, and the other Charges. For there are no more Goods than what remains, after all the Charges are deducted^g.

^g Bonorum possessio admissa commoda & incommoda hæreditaria, itemq; dominium rerum quæ in his bonis sunt, tribuit. Nam hæc omnia bonis sunt conjuncta. l. 1. ff. de bonor. possess.

Bona intelliguntur cujusque, quæ deducto ære alieno supersunt. l. 39. §. 1. ff. de verb. signif.

VI.

If after the Partition there appear any new Charges, whether they be Debts or others, or if any of the Lands divided be evicted, the Heirs shall warrant one another against such Evictions, and shall do one another justice reciprocally, either by a new Partition, or otherwise, pursuant to the Rules which shall be explained in the third Section^h.

^h Judex familiæ eriscundæ nihil debet indivisum relinquere. Item curare debet ut de evictione caveatur his quibus adjudicat. l. 25. §. 20. & 21. ff. fam. erisc. See the third Section.

VII.

The Goods and the Charges are divided among the Co-heirs according to the Portions which they have in the Inheritance, so as that what every one has for his Portion be estimated on the same foot with what the others have for theirs; and that they bear likewise their respective proportions of the Charges, making their condition always as equal as is possible, both as to the advantages, and disadvantages in the Goods, and in the Chargesⁱ.

ⁱ Inter cohæredes communicentur commoda & incommoda. l. 19. in f. ff. fam. eriscund.

VIII. If

VIII.

8. If the equality cannot be exact, in what manner it is to be supplied.

If the Goods and Charges which are to be divided are of such a nature that it is not possible to give to all Goods of the same quality, and to divide the Charges equally, and in such a manner as that the condition of every one may be equal to that of the others: this equality is made up by joining to the Goods of the greatest value, the heaviest Charges, or by indemnifying some other way, those who should suffer any disadvantage, either by returns of Money from one share to another, or by other accommodations which may render equal as much as is possible the condition of the Co-heirs. Thus, for example, if in order to have the use of a House, or other Tenement, which falls to the Lot of one, it should be necessary to subject to some Service another House or Tenement which is in the Lot of another, this Service ought to be established, and the inconvenience thereof ought to be otherwise made amends for, either by the valuation of the Lands and Tenements, or in some other manner. And in fine, the Co-parceners ought mutually to bear with some inconvenience, for the ease and conveniency of one another, and always to prefer that which is most advantageous for them all in general, to what might be for the interest of any one of them in particular¹.

¹ Familix ereiscunde judicium ex duobus constat, id est, rebus atque prestationibus. l. 22. §. 4. ff. fam. ereiscund. Sed etiam cum (judex familia ereiscunde fundum) adjudicat, poterit imponere aliquam servitutem, ut alium alii servum faciat, ex iis quos adjudicat. l. 22. §. 3. eod.

Ut in omnibus aequabilitas servetur. l. 4. in f. comm. divid.

Judicem in praeiis dividendis quod omnibus utilissimum est, vel quod malint litigatores, sequi convenit. l. 21. ff. comm. divid.

IX.

9. What the deceased owed to the Heir, is reckoned part of the Charges.

We must reckon among the Charges of the Inheritance, that which the deceased may have owed to one of the Heirs. For here the quality of Debtor is not confounded with that of Creditor, any farther than for the share which this Heir ought to bear of his own Debt, and he will remain Creditor to the other Heirs for all the over-plus^m.

^m Si filius familias jussu patris obligatus sit, debet hoc debitum praecipere. Sed et in rem patris verit, idem placet. l. 20. §. 1. ff. fam. ereiscund.

X.

10. The Goods which

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1

such kind of Goods which are not capable of being divided, such as an Office, or a House which cannot be divided, or other Effects which none of the Heirs either can, or is willing to take, whether it be because of the price, or for other reasons, which may make it necessary to sell the Goods, in order to divide the price of them, they are sold by Auction, as has been said in another placeⁿ: or if any one of the Heirs is willing to take the Goods that are to be sold, at the price which they shall agree on among themselves, he shall have a less share of the other Goods, or shall refund to the others that which they ought to have out of the Goods which he keeps to himself^o.

ⁿ See the twelfth Article of the second Section of those who happen, &c.

^o See the same Article.

Si familiae ereiscunde vel communi dividendo judicium agatur, & divisio tam difficilis sit, ut pene impossibilis esse videatur: potest judex in unius personam totam condemnationem conferre, & adjudicare omnes res. l. 55. ff. fam. ereisc.

XI.

Seeing this Sale by Auction is to be for the common good of the Co-heirs, every one of them may demand that it be publick, may bid himself for the Thing exposed to Sale, and insist that all persons be received to bid, in order to raise the price of that which none of the Co-parceners either could or would take in his Lot^p.

^p Ad licitationem nonnunquam etiam extraneo emptore admisso: maxime si se non sufficere ad justa pretia alter ex sociis sua pecunia vincere vilius licentem profiteatur. l. 3. C. com. divid.

See the place quoted on the foregoing Article.

XII.

If it is one of the Heirs to whom the Thing that is sold by Auction is adjudged, he shall remain sole and unchanged Proprietor of it, and none of the other Heirs shall have right to claim any share in it by paying in his part of the Price, even altho' it were a thing that were capable of being divided. For it is a voluntary and irrevocable Alienation, and he to whom the thing is adjudged, may say that he did out-bid others in the Price only that he might have the whole to himself and the others cannot divide his Title^q.

^q This is a consequence of the Sale by Auction, which was only done in order to alienate the Thing which either could not be divided, or which the Heirs were not willing to divide, that they might share the price of it among them. V. l. 7. §. 13. ff. comm. divid.

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XIII. As

XIII.

13. Where the Deeds belonging to the Succession are to be lodged.

As the Partition of the Goods and Rights of the Succession gives to every one of the Heirs in particular that which falls to his share, so likewise each of them ought to have only the Deeds and Writings which relate to the Goods and Rights which he has in his Lot. And if there are any Writings which are of common use to several of the Heirs, the principal Heir keeps possession of the Originals which he is to exhibit whenever there is occasion, and in the mean while he gives Copies of them to the others; or if they do not agree to dispose of them in this manner, the Writings are deposited in the hands of a Publick Notary, or they will be otherwise disposed of as the Judge shall direct. And as for the dispositions of the deceased, whether they be a Testament, Codicil, or others, they remain in the hands of the Notary before whom they were sped, that he may give authentick Copies of them to the Heirs; or if they happen to be among the Papers of the Testator, or in the custody of other persons, they are either disposed of according as the Heirs do agree among themselves, or if they cannot agree, the Judge will give directions therein.

* Si quæ sunt cautiones hereditariæ, eas Judex curare debet ut apud eum maneat, qui majore ex parte hæres sit: ceteri descriptum & recognitum faciant: cautione interposita, ut cum res exegerit, ipse exhibeantur. Si omnes iisdem ex partibus hæredes sint, nec inter eos conveniet, apud quem potius esse debeant, fortiri eos oportet: aut ex consensu, vel suffragio eligendum amicis apud quem deponantur, vel in æde sacra deponi debent. l. 7. ff. fam. ercisc.

† Sed & tabulas testamenti debet aut apud eum qui ex majore parte hæres est, jubere manere, aut in æde deponi. l. 4. §. ult. ff. fam. ercisc. See the sixteenth Article of the second Section of those who happen to have, &c. This Article is conceived in such terms as to make it conformable to the usage in France.

XIV.

14. Who is the Plaintiff in a demand of Partition.

If in order to have a Partition, the Co-heirs go to Law with one another, seeing they all demand that which falls to their share, and that their Engagements are reciprocal, they are therefore all of them in the place of Plaintiffs, in the same manner as in the other kinds of Partitions of things that are common. But altho' they are all in effect Plaintiffs in that respect, yet he is only considered as Plaintiff, who first began the Suit. For in Judicial Proceedings, this quality is not regulated by the nature of the Rights which those that go

to Law together have one against the other, but by the first demand that brings the matter into Judgment. Thus, even in causes where only one person is obliged towards the other, as a Debtor to his Creditor, who has naturally on his side the right to demand that which is due to him; it may happen that this Debtor becomes the Plaintiff, as if he summons his Creditor to deliver him up a Bond which he pretends to be null or discharged, or to apply towards payment of the said Debt a Sum which he has already paid. For these are in effect demands which he makes to his Creditor.

* In tribus istis duplicibus judiciis, familie erciscundæ, communi dividundo, finium regundorum, queritur, quis actor intelligatur, quia par causa omnium videtur. Sed magis placuit eum videri actorem qui ad judicium provocasset. l. 2. §. 1. ff. comm. divid.

XV.

If it should happen that after the Partition was made, there should appear a new Co-Heir or Co-Executor, whose long absence had given occasion to believe that he was dead, or whose Right was unknown, as if a second Testament which was not known of had called him with the others to the Succession; this first Partition would be annulled; and it would be necessary to make a new Partition with him of all the Goods that are still in being, and of the value of those which have either been consumed or alienated, that he may have his portion of the whole Inheritance.

* Cohæredibus divisionem inter se facientibus, juri absentis & ignorantis minimè derogari, ac pro indiviso portionem eam quæ initio ipsius fuit, in omnibus communibus rebus eum retinere, certissimum est. Unde portionem tuam cum rebus arbitrio familie erciscundæ percipere potes ex facta inter cohæredes divisione nullum præjudicium timens. l. 17. C. fam. ercisc.

XVI.

When there is any considerable wrong done in a Partition, even altho' the Coparceners should all of them be of age, yet this damage may be repaired pursuant to the Rule explained in another place.

* See the fourteenth Article of the second Section of those who happen, &c. and the remark that is there made upon it.

See likewise the ninth Article of the sixth Section of Covenants, and the fourth Article of the third Section of the Vices of Covenants, and the third Article of the third Section of Rescissions.

XVII.

Partitions may be made three ways, either by the Heirs themselves, if they know Partition.

17. Three ways of making a Partition.

know the value of the things and can agree among themselves; or by Arbitrators or skilful persons whom they chuse by mutual consent: or judicially, if they cannot agree among themselves; in which case the Partition is made by skilful persons who are named by the Judge, if the Heirs themselves do not every one of them name some persons on their party.

⁷ Arbitro accepto fratres communem hereditatem consensu dividentes pietatis officio funguntur. l. ult. ff. fam. creisc.

A Partition may be made by mutual consent, whether it be that the Heirs do it themselves, or by Arbitrators, or skilful persons. And if they do not agree among themselves, the Partition is made by a decretal Order of the Judge, in which case every one of the Parties names skilful Persons on their side, or if the Parties refuse to name, the Judge names them. And this is a nomination which the Judge makes by virtue of his Office; which does not hinder the Parties from giving in their reasons of Recusation against the persons named by the Judge, in order to have other skilful persons named who are not suspected. See the twenty first Title of the Ordinance of the Month of April, 1667.

SECT. II.

Of Things which enter or do not enter into the Partition; and of the Expences laid out by the Heirs or Executors, which they may recover.

WE shall not put down here among the Goods which enter into the Partition, those which are liable to be brought into the Mass of the Inheritance by way of Collation or Hotch-pot, altho' they are to be divided as well as the others; because the matter relating to the Collation of Goods is explained in another place, as has been mentioned at the end of the Preamble of this Title.

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I.

WE must distinguish among the Goods which dying persons leave behind them, three different sorts which they may have had. The first is of those Goods wherein the right which the deceased had to them ceased by his death, such as those of which he had only the Usufruct, or which were subject to a Substitution, and others of which mention has been made in the fifth Article of the first Section of the first Title. The second is of those Goods which the deceased may have given away in Legacies, or otherwise, to other persons than his Heirs or Executors. And the third is of those Goods which remain to his Heirs or Executors. And it is this third sort of Goods, which come into Partition or Distribution, whether the deceased died Testate, or Intestate.

⁸ Per familie eriscundæ actionem dividitur hereditas, five ex testamento, five ab intestato. l. 2. ff. fam. creisc.

II.

Altho' the things bequeathed by a Testator, and the Goods which he may have had that were subject to a Substitution, or to a Fiduciary Bequest, are not comprized among the Goods of the Succession, which are to be divided among the Heirs; yet nevertheless, if the Legacy was conditional, so that the Legatary was not to have the thing bequeathed, but upon a condition, or in a case which it was altogether uncertain whether it would happen or not, or that the Fiduciary Bequest was only to take

take place in a time which was not as yet come; in all these cases the Heirs might in the mean while divide those kinds of things, they taking among themselves the necessary precautions for the events which might oblige them to restore the Goods, and giving to the Legataries, and to the persons who may have right to the substituted Goods, the security which shall be spoken of in its proper place^b.

^b Res quæ sub conditione legata est, interim hæredum est. Et ideo venit in familiæ eriscunde judicium, & adjudicari potest, cum sua scilicet causa, ut existente conditione, eximatur ab eo cui adjudicata est, aut deficiente conditione, ad eos revertatur à quibus relicta est. l. 12. §. 2. ff. fam. erisc.

Si scriptus ex parte hæres rogatus sit præcipere pecuniam &c. ut quibus testamento legatum erat, distribuere: id quod sub conditione legatum est tunc præcipere debet, cum conditio extiterit: interim aut ei, aut his quibus legatum est, satisfieri oportet. l. 96. §. pen. ff. de leg. 1. See the seventh Article of the tenth Section of Legacies, and the nineteenth Article of the first Section of Substitutions both direct and fiduciary.

III.

3. The particular Legacies which are given to any of the Heirs or Executors, do not enter into the Partition.

We may reckon among the things which do not enter into the Partition, that which a Testator gives as a particular Legacy to some one of his Heirs or Executors, over and above his equal share with the others. For that Heir or Executor is to take the said thing before the Partition^c.

^c Si uni ex heredibus fuerit legatum, hoc debet ei officio judicis familiæ eriscunda manifestum est. l. 17. §. 2. ff. de legat. 1.

IV.

4. The Goods which are to be restored, are not divided.

We must likewise exclude from the Partition all those Goods of the Succession that have been acquired by ways which oblige the Possessors to restore them: such as things that have been got by stealth, or robbery^d.

^d Sed & si quid ex peculatu, vel ex sacrilegio acquisitum erit, vel vi, aut latrocinio, aut aggressura, hoc non dividetur. l. 4. §. 2. ff. fam. erisc. See the last Article of the second Section of those who happen, &c.

V.

5. Nor the things which can only serve for some ill use.

We ought likewise to place in the same rank those kinds of things which can be applied only to some ill use, such as Books of Magick, and other things of the like nature, which ought to be suppressed^e.

^e Mala medicamenta, & venena veniunt quidem in judicium, sed judex omnino interponere se in his non debet. Boni enim & innocentis viri officio cum fungi oportet. Tantundem debet facere &

in libris improbatæ lectionis, magicis fortè vel his similibus. Hæc enim omnia profinus corruptenda sunt. l. 4. §. 1. ff. fam. erisc. See the seventeenth Article of the second Section of those who happen to have, &c.

VI.

Besides the Goods which are extant in the Inheritance at the time of the Partition, or which ought to be brought into it by way of Collation, or Hotchpot, the Mass of the Inheritance ought to be augmented with the Fruits and Revenues of the common Goods which every one of the Heirs may have enjoyed by himself; for he ought to be accountable for them, pursuant to the Rule explained in the third Article of the twelfth Section of Heirs and Executors in general, and the said Fruits are a part of the Goods of the Succession which come into the Partition^f.

^f Fructus omnes augent hereditatem, sive ante aditam, sive post aditam hereditatem accesserint. l. 20. §. 3. ff. de hered. pet. Fructibus augetur hereditas, cum ab eo possidetur à quo peti potest. l. 2. in f. C. de pet. hered. See the third Article of the twelfth Section of Heirs and Executors in general, and the Texts which are there quoted.

It is in the sense explained in this Article, that we ought to understand what is said in these Texts, that the Fruits augment the Inheritance. But if the Goods of a Succession were to be estimated, in order to adjust for example the Falcidian Portion, or the Legitime, we ought not in that case to comprize in the said Estimate the Fruits and other Revenues which the Heirs who were in Possession of the Inheritance may have enjoyed. For the said Fruits would not increase the Mass of the Goods of the deceased; but they would be only an Accessory which would belong to every one of the Heirs, according to their shares in the Inheritance. See the seventh Article of the first Section of the Falcidian Portion, and the eleventh Article of the third Section of the Legitime.

VII.

The expences which the Heirs or Executors have been at either in cultivating the Lands, or in gathering and preserving the Fruits, are to be deducted out of the Fruits which they are bound to account for to one another. So that there enters into the Partition, only so much as remains of the clear value of the Fruits, after the Expences are deducted^g.

^g Fructus intelliguntur, deductis impensis, quæ quærendorum, cogendorum, conservandorumque eorum gratia fiunt. l. 36. §. ult. ff. fam. erisc.

VIII.

Altho' the Expences laid out by one of the Heirs or Executors in order to reap the Fruits, such as those for cultivating the Lands, and others of the like nature, happen to be ineffectual, either when there is no Crop at all, or when

6. The Revenues which every Heir has received come into the Partition.

7. The Expences laid out about the Fruits, are to be deducted out of them.

8. Altho' there be no Fruits, yet the Heir recovers the charges he has been at the

in cultivating the Lands.

the Crop is less than the Expences; yet the Heir or Executor who had laid them out, will nevertheless recover them, for they were necessary for the common interest^h.

^h Quod si sumptus quidem fecit, nihil autem fructuum perceperit, æquissimum erit, rationem horum quoque in bonæ fidei possessoribus haberi. l. 37. ff. de hered. pet. See the following Article.

IX.

9. The Heirs recover the necessary and useful Expences, altho' the event makes them unprofitable.

It would be the same thing if an Heir, or Executor, had been at any expence to preserve any of the Goods belonging to the Inheritance, even altho' the thing on which the expence was laid out should happen to perish, as if a House which he had caused to be propped up in order to prevent its fall, was afterwards consumed by fire. For there is this difference between the condition of this Heir or Executor, as of every honest and fair Possessor, and that of an unjust Possessor, that whereas the unjust Possessor cannot recover the necessary or profitable Expences which he has laid out on the thing which he possessed unjustly, unless the thing itself is still in being, and is improved by the said Expences, and that on the contrary he loses his Expences if the thing is perished, or is no ways the better for what has been laid out upon it; the Heir or Executor, and every other honest and fair Possessor, recovers these sorts of Expences, altho' the thing be totally destroyedⁱ.

ⁱ Planè in cæteris necessariis & utilibus impensis posse separari, ut bonæ fidei quidem possessores has quoque imputent: prædo autem de se quæri debeat, qui sciens in rem alienam impendit. Sed benignius est, in hujus quoque persona haberi rationem impensarum. Non enim debet petitor ex aliena jactura lucrum facere; & id ipsum officio judicis continebitur, nam nec exceptio doli mali desideratur. Planè potest in eos differentia esse, ut bonæ fidei quidem possessor omnimodo impensas deducat, licet res non existet, in quam fecit, sicut tutor vel curator consequuntur. Prædo autem non aliter quam si res melior sit. l. 38. ff. de hered. pet. Quia nullus casus intervenire potest qui hoc genus deductionis impediatur. l. 51. ff. fam. erisc.

X.

10. Three kinds of Expences.

Among the Expences which an Heir or Executor may have laid out on the Goods belonging to the Inheritance, we must distinguish three sorts of them. Those which are necessary, those which, altho' not necessary, are nevertheless useful; and those which have been laid out only for pleasure, without any necessity, and without any profit^l. And according to these differences, the Heir, or Executor, recovers or does

not recover his Expences, by the Rules which follow.

^l Impensarum quædam sunt necessariae, quædam utiles, quædam verò voluptariae. l. 1. ff. de impens. in res dot. fact.

Altho' this Law has relation to another matter, yet it may be applied here, as likewise those which are quoted on the following Articles. See touching the several sorts of Expences, the eleventh Article and the other following Articles of the third Section of Dowries, and the sixteenth and following Articles of the tenth Section of the Contract of Sale.

XI.

The necessary Expences are those¹¹ which one is obliged to lay out in preserving the Goods, and for preventing their perishing, or being damaged; such as are the ordinary Repairs in Buildings, those which are made to prevent their fall, that which is laid out in planting new Trees in the room of others that are dead, or blown down, and other such like Expences, the want of which would cause some damage to the Inheritance. Which is the reason why the Heirs who have been at any expences of this kind ought to recover them^m.

^m Necessariæ hæc dicuntur quæ habent in se necessitatem impendendi. l. 1. §. 1. ff. de impens. in res dot. fact.

Si ædificium ruens quod habere mulieri utile erat, refecerit, aut si oliveta rejecta restauraverit. d. l. 1. §. 3.

Impensæ necessariæ sunt, quæ si factæ non sint, res aut peritura, aut deterior futura sit. l. 79. ff. de verb. signif. V. l. 39. ff. de hered. pet.

XII.

The useful Expences are those which, altho' they are laid out without necessity, yet augment the Estate; such as the planting of an Orchard, or some additional Building to an House, in order to raise the Rent of it. And these sorts of Expences ought to be repaid to the Heirs or Executors who have laid them outⁿ.

ⁿ Utiles autem impensæ sunt quas maritus utiliter fecit, remq; meliorem uxoris fecerit, hoc est, dotem. Veluti, si novellatum in fundum factum sit, aut si in domo pistrium, aut tabernam adjecerit. l. 5. §. ult. Et l. 6. ff. de impens. in res dot. fact.

Utiles non quidem minuunt ipso jure dotem, veruntamen habent exactionem. l. 7. in f. eod.

Utiles impensas esse Fulcinus ait, quæ meliorem dotem faciant, non deteriores esse non sinant: ex quibus redditus mulieri acquiratur: sicut arbusculi plantatione ultra quam necesse fuerat. l. 79. §. 1. ff. de verb. signif. In his impensis & pistrium, & horreum insulae dotali adjectum plerumque dicimus. d. §. in fin.

XIII.

The Expences which being neither necessary nor useful, are laid out only for pleasure, such as a superfluous Building,

13. Expences laid out for pleasure.

ing, Waterworks, Painting, Carving, and others of the like nature, which an Heir had laid out, knowing that he had Co-heirs, are not recoverable, and he who has laid them out, ought to blame himself for it^o. But this justice may be done him, to leave, if it is possible, in his lot the Land or Tenement on which the said Expences have been laid out, without estimating it at a higher rate upon that account, or even to reimburse the said Heir of so much as the Land or Tenement on which the said Repairs have been made, is really the better for them; for in that case these Expences would be useful. But if the said Heir had laid out these kinds of Expences, being ignorant that he had any Co-heirs, and looking upon himself to be the sole Owner; it would be but just and equitable that he should suffer no manner of prejudice from his honest and fair dealing, and that some regard should be had thereto in the Partition, according as the circumstances might require.

^o Voluptariæ autem impensæ sunt quas maritus ad voluptatem fecit, & quæ species exornant. l. 7. ff. de impens. in res dot. fact.

Voluptariæ sunt quæ speciem duntaxat ornant, non etiam fructum augent. Ut sunt viridaria, & aquæ salientes, incrustationes, loricationes, picturæ. l. 79. §. 2. ff. de verb. signif.

Ex duobus fratribus uno quidem suæ ætatis, alio verò minore annis, cum haberent communia prædia rustica, major frater in saltu communi habenti habitationes paternas, ampla ædificia edificaverat, cumque eundem saltum cum fratre divideret, sumptus sibi, quasi re meliore ab eo facta, desiderabat, fratre minore jam legitimæ ætatis constituto. Herennius Modestinus respondit, ob sumptus nulla re urgente, sed voluptatis causa factos, cum de quo quaeritur, actionem non habere. l. 27. ff. de negot. gest.

Altho' this Brother mentioned in the Text could not perhaps claim in the rigour of the Law, to be reimbursed of these kinds of Expences; yet Equity would seem to require, that some amends should be made him some other way, as is explained in the Article.

^o Videamus tamen ne & ad picturarum quoque & marmorum, & cæterarum voluptariarum rerum impensæ æquè proficiat nobis doli exceptio, si modo bonæ fidei possessores simus. l. 39. §. 1. de hered. petn.

XIV.

14. Expences for pleasure which are useful.

We must not reckon in the number of Expences made for bare pleasure, those which are laid out in embellishing a Land or Tenement, or other thing which is the more saleable by reason of the said Ornaments¹.

¹ Quod si he res in quibus impensæ factæ sunt promercales fuerint, tales impensæ non voluptariæ, sed utiles sunt. l. 10. ff. de exp. in res dot. fact.

XV.

15. Damages against

If one of the Heirs should refuse to divide the Goods of the Succession, and

to bring into it things which were liable to perish, such as Cattel that are in his possession, and it should happen during his delay that these sorts of things which might have been sold did really perish, he would be liable for them, because this loss might be imputed to him. Which is to be understood only of the cases where there being no dispute among the Heirs, as to the right of any of them to the Succession, he who puts off the Partition could have no reasonable excuse for his delay. But if an Heir who is in possession of the Inheritance fairly and honestly, believing himself to be sole Heir, should contest the right of one who pretending likewise to be Heir, should demand of him the Goods of the Succession; these sorts of Losses which should happen during their controversy, ought not to be imputed to him. For it would be as an unforeseen accident. And even altho' he had foreseen it, yet the fear of this event would not oblige him to abandon the right which he pretended to have singly to the Goods of the Inheritance².

² Illud quoque quod in oratione Divi Hadriani est, ut post acceptum iudicium id actori præstetur, quod habiturus esset si eo tempore quo petit restituta esset hereditas: interdum durum est. Quid enim si post litem contestatam mancipia aut jumenta, aut pecora depierint? damnari debet secundum verba orationis: quia potuit petitor, restituta hereditate, distrahisse ea, & hoc iustum esse in specialibus petitionibus Proculo placet. Cassius contra sensit. In prædonis persona Proculus recte existimat; in bonæ fidei possessoribus, Cassius. Nec enim debet possessor aut mortalitatem præstare, aut propter metum huius periculi temere indefensum jus suum relinquere. l. 40. ff. de hered.

S E C T. III.

Of Warranties between Co-heirs, and of the other consequences of the Partition.

IT is not necessary to repeat here what is meant by Warranty, nor the general Rules relating to this matter, which has been explained in the Title of the Contract of Sale³; and in this Section we shall treat only of the Rules which are peculiar to the Warranty between Co-heirs.

³ See the third Article of the second Section of the Contract of Sale, and the tenth Section of the same Title.

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2. Two different effects of this Warranty.
3. Warranty for the debts due from the Succession, and the other Charges.
4. The Heirs may regulate differently the Warranties.
5. The Heirs warrant one another for their respective proportions of the Charges.
6. And for those which appear only after the Partition.
7. The casualties after the Partition regard those to whom they happen.
8. The Heir is bound for a loss which has happened in consequence of a deed which he may be blamed for.
9. The Heir who disposes of any thing privately, bears alone the losses which attend it.

I.

¹ Warranty is reciprocal among the Co-heirs. **A**S Co-heirs have their Portions of the Inheritance by the same Title and the same Right which is common to them; so their condition ought to be the same, and they ought all of them to have the same security for what is given them to their shares. Thus the Partition of the Inheritance implies the condition that the Portions of the Co-heirs shall remain bound reciprocally for the Warranty of one another^a, by the Rules which follow.

^a Curare debet iudex familiæ eriscundæ, ut de evicitione caveatur his quibus adjudicat. l. 25. §. 21. ff. fam. erisc.

II.

² Two different effects of this Warranty. We must distinguish two different effects of the Warranty between Co-heirs, according to two different kinds of Goods that may be in the Succession. One is of those things which are really in being, Moveables or Immoveables, and which may be seen and touched, such as a Horse, a Suit of Hangings, Jewels, and other Moveables: a House, a Vineyard, a Field, and other Immoveables. The other is of Rights, such as a Bond, a Rent, a Sentence or Judgment, a Transaction, or other Title which may create a Debt, or some other Right^b. In the Partition of Things which are really in being, and may be seen and felt, the Warranty is not that those things do really exist, and are in being, for that every one sees. But since it is possible that they may be no

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part of the Inheritance, if it should happen that any one should claim a Right of Property in them, the Heirs ought to warrant one another that the said Goods are really and truly a part of the Succession^c. And in the Partition of the Debts due to the Succession, and of the other Rights, since one may be ignorant whether there be any such Debts or Rights at all belonging to the Estate, or not, whether a Rent be still due, or whether it has been redeemed, if an Obligation is annulled by payment, or by some other cause; the Warranty for Debts and Rights implies, that they not only are a part of the Inheritance, but that they actually are such as they appear, that they are really and truly due, and that they do belong to the Heir to whose lot they fall^d; unless it be that this Warranty has been otherwise regulated among the Heirs, as shall be said in the fourth Article.

^b Quædam res corporales sunt, quædam incorporales. Corporales hæ sunt quæ tangi possunt, veluti fundus, homo, vestis, aurum, argentum, & denique aliæ res innumerabiles. Incorporales autem sunt quæ tangi non possunt, qualia sunt ea quæ in jure consistunt, sicut hæreditas, usufructus, usus, & obligationes quoquo modo contractæ. inst. de reb. corp. & incorp.

^c De evicitione caveatur. l. 25. §. 21. ff. fam. erisc. See the second and third Articles of the first Section.

^d Si nomen sit distractum. Celsus libro nono digestorum scribit locupletem esse debitorem non debere præstare, debitorem autem esse præstare nisi aliud convenit. l. 4. ff. de hered. vel att. vend. Duntaxat ut sit, non ut exigi etiam aliquid possit. l. 74. §. ult. ff. de evicition.

Altho' these Texts respect other matters, yet they may be applied here.

III.

Besides this warranty which the Heirs owe to one another with respect to what enters into the Partition, that what every one has in his Lot is a part of the Inheritance, and that it belongs to no other person; they ought likewise to warrant one another against all Suits at the instance of the Creditors to the Succession, or of others who shall pretend to have Mortgages or other Securities, on that which has fallen to the Lot of one of the Heirs^e.

^e See the following Article.

IV.

The Warranties explained in the two preceding Articles, are natural and just. And altho' no mention had been made of them in the Partition, yet they would be tacitly implied, and the Heirs would be reciprocally obliged to them. But

N n n n

if

⁴ The Heirs may regulate differently the Warranties.

if they agree either to add to these Warranties, or to take any thing from them, their agreement will be to them instead of a Law. Thus for the Debts owing to the Succession, they may agree that they shall warrant one another not only that they are due, but likewise that the Debtors are solvent, and will pay the Debts, or that the Heirs will make them good to one another, either after a bare refusal of payment from the Debtor, or after the using of such diligence for recovery of them, as they shall agree on. And they may on the contrary divide the said Debts without any Warranty on the one part or the other, not even as to those which may happen to have been acquitted, or of which perhaps there remains nothing due for some other reason. Which may be equitable upon several considerations, as, among others, if they were Heirs to a Merchant who sold by Retail, and who had left behind him a great many small Debts, the warranting of which would only give occasion to a great many Law-Suits⁵.

⁵ Si familiae erciscundæ judicio, quo bona paternæ inter te & fratrem tuum æquo jure divisa sunt, nihil super evictione rerum singulis adjudicatarum specialiter inter eos convenit: id est, ut unusquisque eventum rei suscipiat: recte possessionis evictæ detrimentum fratrem & cohæredem tuum pro parte agnoscere præses provinciae per actionem præscriptis verbis, compellet. *l. 14. C. fam. ercisc.* See the twenty fourth and following Articles of the tenth Section of the Contract of Sale.

V.

5. The Heirs warrant one another for their respective portions of the Charges.

If in the Partition of a Succession, which is burdened with Debts, or other Charges, the Heirs have engaged to one another, to acquit each of them some part of the said Debts and Charges, they shall reciprocally warrant one another against them, and every one shall acquit the Charges which he has taken upon himself. And if they have made no agreement touching this matter, they must acquit the Charges in proportion to the shares which they have in the Inheritance, and every one of them shall warrant the others for his Portion of the Charges⁶.

⁶ Neque æquam, neque usitatam rem desideras, ut æs alienum patris tui non pro portionibus hereditariis exolvās tu & frater cohæres tuus. *l. 1. C. si cert. petatur.*

VI.

6. And for those which appear only after the Partition.

If after the Partition there should appear any new Debts, or new Charges, which were not known of before; as if some of the Lands should appear to

be burdened with a Ground-Rent, or with other Charges, besides the usual duties of Quit-Rents, and others of the like nature, or that some part of the Goods should appear to be subject to a Substitution, these new Charges, whatever kind they were of, would regard all the Heirs, and they would reciprocally warrant one another against them⁷.

⁷ Pro hereditariis partibus heredes onera hereditaria agnoscere, etiam in fisci rationibus, placuit. *l. 2. C. de hered. pet.*

VII.

The losses which may happen by casualties after the Partition, regard him to whose Lot the thing has fallen which perishes, or is damaged. As if it was Grain, Liquors, Beasts, or other things subject to these kinds of Losses, or a Land or Tenement situated on the bank of a River, which has been carried away by a Flood, or a House burnt down by Fire. For in all these cases, and even those that are the least foreseen, the Thing not being any more in common, he whom the Partition has made Master of it suffers the loss thereof⁸.

⁸ Quæ fortuitis casibus accidunt, cum prævideri non potuerint (in quibus etiam aggressura latronum est) nullo bonæ fidei judicio præstantur. *l. 6. C. de pignor. act.*

VIII.

If by a consequence which may be imputed to the deed of one of the Heirs, there happens some loss or damage to any of the Goods of the Inheritance, he shall be liable for it. Thus, for Example, if an Heir having committed some Crime or Offence, and his Goods being seized, some of the Goods belonging to the Inheritance had been seized among them; and that this Seizure had been attended with the loss of some profit or income which might have been drawn from the said Goods, or that the said Goods had been damaged by the Seizure, or that it had occasioned other damages, he whose Crime or Offence had had this consequence, would bear singly the loss which his own deed had occasioned, and he would warrant his Co-heirs against it⁹. And it would be the same thing, altho' this Heir had committed no Offence, if the damage proceeded from his act. As if a Creditor to the Inheritance whom he was obliged to pay off, had caused other Goods of the Succession to be seized than those which had fallen to his Lot. For in this case, he would be accountable for the damages that his Co-heirs might suffer thereby.

⁹ Si

¹ Si is cum quo fundum communem habes ad delictum non respondit, & ob id motu judicis villa diruta est, aut arbuta succisa sunt, præstabitur tibi detrimentum judicio communi dividundo. Quidquid enim culpa socii admissum est, eo judicio continetur. l. 20. ff. comm. divid.

We have given in this Article another Example than that mentioned in the Law which is here quoted, to make the Rule conformable to the Usage in France, by which Contumacy is not punished with that rigour, which sometimes may be unjust. But this matter does not belong to this place.

IX.

9. *The Heir who disposes of any thing privately, bears alone the losses which attend it.* If any one of the Heirs disposes by himself of any of the Goods belonging to the Inheritance, with design to make an advantage thereby to himself without the privity of his Co-heirs; as if he sells a Thing, lets it out to hire, or farms it out, he shall not only be bound to pay in to his Co-heirs the profit

which he shall have made by it; but if his act is attended with any loss, as if the person to whom this Heir has sold or let the Thing, proves insolvent, he alone shall bear the loss which happens, instead of the profit which he designed to have made by it for himself. And he shall be answerable to his Co-heirs both for the Rents of the Lands and Tenements which he has let or farmed out, and for the value of the Goods which he has sold^m.

^m Sive autem locando fundum communem, sive colendo, de fundo communi quid socius consecutus sit, communi dividundo judicio tenebitur. Et si quidem communi nomine id fecit, neque lucrum, neque damnum sentire eum oportet. Si vero non communi nomine, sed ut lucretur solus, magis esse oportet ut & damnum ad ipsum respiciat. l. 6. §. 2. ff. comm. divid. v. l. 5. C. de adif. priv.

What is said in this Text of a Partner, may be applied to a Co-heir.





THE
CIVIL LAW
IN ITS
NATURAL ORDER.

PART II.
Of SUCCESSIONS.

BOOK II.
Of Legal Successions, or Succession to INTESSTATES.



HAVING explained in the first Book, all that belongs in common both to Legal Successions, or Succession to Intestates, and to Testamentary Successions; we must now proceed to the matters which are peculiar to these two kinds of Successions, and explain the detail of each of them in their Order. As to which, it is necessary to observe, that in the Books of the *Roman Law* the Testamentary Successions have the

first place^a; but we have thought it more natural to begin with the Succession of Intestates; and that chiefly for two reasons. The first is, because, as has been remarked in another place^b, the Successions to Intestates are more natural than the Testamentary Successions, and of a much more universal and more necessary use; seeing we might do very well without the Testamentary Successions, but the Legal Successions, or Successions to Intestates are absolutely necessary. And the Customs of *France* own none else for Heirs but those of the Blood

Blood and Family of the deceased. So that it may be said, that the Testamentary Successions are, as it were Exceptions to the Natural Law of Legal Successions, and that the liberty of disposing of one's Estate by Testament in favour of other persons than the Heirs of Blood, and especially the power of making other Heirs, is as it were a dispensation from the common and universal Rule, which calls the Heirs of Blood to the Successions. Thus, as it is necessary to know the common Order it self, before we enquire into the changes which have been made in it; so the matters relating to the Succession of Intestates ought to take place. And before we treat, for instance, of the liberty which a Testator has to dispose of his Goods by Testament to the prejudice of his Children, it is necessary to know that the Children ought naturally to succeed to their Father.

^a Posteaquam Prætor locutus est de bonorum possessione ejus qui testatus est, transitum fecit ad intestatos, cum ordinem secutus, quem & lex duodecim tabularum secuta est. Fuit enim ordinarium ante de judiciis testamentum, dein sic de successione ab intestato loqui. l. 1. ff. si tab. test. ult. ext.

^b See the Preface to this Second Part, N^o. VIII.

The second consideration which has induced us to begin with the Legal Successions is, that the matters belonging to these Successions are much shorter, and much easier, than the matters concerning Testaments, which contain a vast number of particulars, full of different sorts of difficulties; and that it is the method in all Arts and Sciences, to begin, as much as is possible, with that which is easiest, and which leads to the knowledge of what is most difficult. Thus we had reason to believe, that it would be on one side more natural to give to the Legal Successions the first rank, in which they are placed by the Order of the Society of Mankind, which regulates the use of Successions: and that on the other side it would be more methodical in explaining these two matters which ought to be distinguished, to observe the order and method of Sciences, which requires, that that which is most simple, most easy, and most natural, should precede that which is more intricate, more difficult, and less natural. And altho' it is true, that when the question is to judge in any particular case, who it is that is to succeed, it is necessary to begin, by enquiring whether there is any Testament that may have its effect, because if there is any such, the Testamentary Heir excludes

the Next of Kin^c; yet it does not follow from this bare consideration, which relates only to the question who shall succeed, that in general the Right of Succession by Testament is a matter whereof the Rules ought to precede those which belong to the Succession of Intestates. For the Order of the Questions that occur in any Cause, and the Order of the Rules by which they are to be decided, have nothing belonging to them in common.

^c Perspicis quod testamentariae successionis spe durante intestato bona defuncti non rectè vindicantur. l. 8. C. comm. de success.

It is not necessary to point out here the particular Order of the several matters which compose this second Book of Legal Successions, or Succession to Intestates; since that appears sufficiently by the Titles of the said Matters. Neither shall we take up any time here to explain the Principles of Natural Equity, which transmit the Successions to the Heirs of Blood. The Reader may see on this subject what has been said concerning it in another place^d.

^d See the Preface to this Second Part, N^o. IV.

There are three Orders of Persons who succeed to Intestates. That of Children and other Descendants; That of Fathers and Mothers and other Ascendants; And that of Brothers and Sisters and other Collateral Relations. And these three Orders shall be the subject matter of the three first Titles of this Book.

We may add as a fourth Order of Heirs to Intestates, that which in default of Relations calls the Husband to the Succession of his Wife, and the Wife to the Succession of her Husband^e. But this kind of Succession being reduced to one single Rule, it is not necessary to distinguish it under a separate Title; and we shall add it in a Section at the end of the third Title.

^e See the Preface to the Second Part, N^o. XI.





TITLE I.

*In what manner CHILDREN
and other DESCENDANTS
succeed,*

SECT. I.

Who are the Children and Descendants.

The CONTENTS.

1. *Who are the Children.*
2. *Who are the Descendants.*
3. *All Descendants are included under the name of Children.*
4. *Bastards are not comprized under the name of Children.*
5. *Children born in the seventh or eleventh Month.*
6. *Of Posthumous Children.*
7. *Of Still-born Children.*
8. *Of Monsters.*
9. *The Child born during the Marriage is presumed to be the Child of the Husband.*

I.

1. Who are the Children.

BY Children is meant properly those who are in the first degree, that is to say, the Son or the Daughter who are born immediately of the person to whom they are to succeed. And the name of Children is likewise given in a second sense to all the Descendants which are spoken of in the following Article. And when we would distinguish these from the Children of the first degree, we give them the name of Grand-children^a.

^a Liberatorum appellatione nepotes, & pronepotes, ceterique qui ex his descendant, continentur. l. 220. ff. de verb. signif. V. §. ult. inst. qui test. tut. dar. poss.

II.

2. Who are the Descendants.

The Descendants are those who are born of the Son or Daughter; whether they be in the second degree of Grand-son, Grand-daughter, or in the third degree, or other more remote degree. For whatever degree they are in at ever so great a distance, they are called Descendants, or Grand-children: and they have likewise the general name of Chil-

dren of those of whom they are descended^b.

^b Natorum appellatio & ad nepotes extenditur. l. 104. ff. de verb. signif.

III.

Under the name of Children and Descendants are comprehended Sons and Daughters, Grand-sons and Grand-daughters, without distinction either of Sex or Degree, and whether they be descended of Sons or of Daughters, and whether they be under the Power and Authority of their Father, or not^c.

^c Liberatorum appellatione continentur non tantum qui sunt in potestate, sed omnes qui sui juris sunt. Sive virilis, sive foeminini sexus sunt: exve foemini sexu descendentes. l. 56. ff. de verb. signif.

IV.

By the name of Children is understood only those who are lawfully begotten; and this name is not given to Bastards, but when it is accompanied with some addition, such as that of natural Children, or some other which may distinguish their condition from that of legitimate Children. And when the question is concerning the Succession of an Intestate, as Bastards have no share in it, so they are not comprized under the name of Children^d.

^d See the eighth Article of the second Section of Heirs and Executors in general.

V.

We must reckon in the number of Children that are not legitimate, those who are born within so short a time after the Marriage of their Mother, that the Husband has just reason to say that he is not their Father: and likewise those who are born so long a time after the death of the Husband, that it is reasonable to judge that they have been conceived only after his death^e.

^e De eo qui centesimo octogesimo secundo die natus est, Hippocrates scripsit, & Divus Pius pontificibus rescripsit, iusto tempore videri natum. l. 3. §. ult. ff. de suis & legit. hered. Septimo mense nasci perfectum partum jam receptum est, propter auctoritatem doctissimi viri Hippocratis. Et ideo credendum est eum qui ex iusta nuptiis septimo mense natus est, iustum filium esse. l. 12. ff. de statu hom.

^f Post decem menses mortis natus, non admittitur ad legitimam hereditatem. l. 3. §. penult. ff. de suis & legit. hered. De muliere quae parit undecimo mense, V. Nov. 39. C. 2.

We have not set down in this Article the precise time mentioned in the Texts here quoted, because the shortest time which is marked for a forward birth, and the longest time for a backward

backward birth, may be joined with such circumstances as to make us doubt of the certainty of the Rule concerning the time necessary for a lawful birth. Neither does there appear any Natural Principles by which it may be demonstrated, that a Child, in order to its being born at the due time, must needs have been conceived a hundred fourscore and two days before its birth, and that a Child born within a shorter time after the Marriage cannot be legitimate. Neither do we know of any Natural Principles which demonstrate, that a birth cannot be delayed beyond the tenth month. For as to the forward birth, altho' we had the experience of Children certainly conceived at a certain day, born afterwards on the hundredth fourscore and second day, and which had lived a long time, and other proofs of Children born one or two days sooner, which were not able to live; yet we could not infer from thence, that the space of a hundred fourscore and two days is so precisely necessary, that it is absolutely impossible for a Child to live, if it wants one day of the said time. And if it should happen, that a Child which had been certainly conceived about five months only before its birth, should nevertheless live several years, which very credible persons affirm that they have seen, this event would not be looked upon as an effect impossible to Nature, but as being natural, although very singular. And as to the birth in the eleventh month after the Husband's death, it is known, that there are Examples both antient and modern, of Children who have been adjudged to be legitimate, altho' born a long time after ten months from the death of their Father. So that it does not seem possible to regulate the just time of a Woman's going with Child, in order to determine that a Child is illegitimate, if it is born a few days sooner, or a few days later. And it is not reasonable that a question of this importance should depend on a Rule which undertakes to fix the time of the operations of Nature, and especially of those which the combination of different causes does diversify, and where it does not seem possible to point out the precise bounds of what Nature is able, or not able to do. But it seems reasonable that in the particular cases where the question is, whether a Child be legitimate or not; the doubt arising from this, that the Child's birth is either too forward, or too backward, we should join to the common Rules which

result from the Texts quoted on this Article, as to what concerns the time of a Woman's going with Child, the consideration of the particular circumstances, in order to decide wisely and prudently a question of so great consequence, in which the honour of a Mother, the state of a Child, and the quiet of the Families, which have an interest both in the one and the other, are all equally concerned.

See the fifth Article of the second Section of Heirs and Executors in general, and the Remark which is there made on it.

[It may not be improper to observe here, that according to the Law and Custom of England, he who marries a single Woman who is with Child, whether it be by himself, or any other person, makes her issue legitimate, altho' it be born immediately after Marriage: For in this case the Marriage demonstrates whose the Child is. But it is to be distinguished in the case of him that marries a Widow with Child, whether she be apparently with Child at the time of her second Marriage, or whether it be doubtful. For in the first case, it shall be reputed the Issue of the former Husband; and in the other case, of the latter Husband. Fleta lib. 1. c. 14. Coke 1 Instit. fol. 244. a. Cowel's Institutes of the Laws of England, Book 1. Tit. 9.]

VI.

The Children who are not as yet ^{6. Of Posthumous Children.} born when their Fathers die, whom we call Posthumous Children, and likewise those who are taken out of their Mother's Womb, she being dead before she was brought to bed, are reckoned in the number of Children who succeed. And although they are not as yet born, when the Successions which they are to inherit fall to them, by the death of their Father, Mother, or others their Relations; yet they belong to them upon condition that they shall be born alive, and they are considered as Heirs already before their births.

** Sicuti liberorum eorum qui jam in rebus humanis sunt curam prætor habuit, ita etiam eos qui nondum nati sint, propter spem nascendi, non neglexit. Nam &c hac parte edicti eos tutus est, dum ventrem mittit in possessionem. l. 1. ff. de ventre in poss. mitt.*

Altho' these Posthumous Children are not as yet born when the Succession falls to them, yet it belongs to them, and it is kept for them till their birth. See the seventh Article of the following Section, and the fourteenth Article of the first Section of Curators.

VII.

Still-born Children are not counted in ^{7. Of Still-born Children.} the number of Children who succeed. And although they were alive in their Mother's Womb at the time that the Successions which concerned them fell, yet they have no share in them. For they are considered in the same manner as if they never had been born^b.

^b See

^b See the fourth Article of the second Section of Heirs and Executors in general, and the fourth and fifth Articles of the first Section of Persons.

VIII.

8. Of Monsters. We ought likewise much less to place in the number of Children, those Lumps of Flesh, or Monsters, which are born without humane shape¹.

¹ See the fourth Article of the second Section of Heirs and Executors in general, and the fourteenth Article of the first Section of Persons.

IX.

9. The Child born during the Marriage, is presumed to be the Husband's: and it is held for legitimate, unless the contrary is proved¹.

¹ Pater est quem nuptiæ demonstrant. l. 5. ff. de in jus vocand.

[By the Common Law of England, if the Husband be within the four Seas, that is, within the Jurisdiction of the King of England, if the Wife hath Issue, no proof is to be admitted to prove the Child a Bastard. For in that case Filiatio non potest probari, unless the Husband hath an apparent impossibility of Procreation; as if the Husband be but eight years old, or under the age of Procreation. Coke 1 Instit. fol. 244.]

SECT. II.

The Order of the Succession of Children and Descendants.

IT is not necessary to give an account here of the several dispositions of the Roman Law touching the Succession of Children, in the number of whom they reckoned those who had this name given them by Adoption, nor of the differences which they made between the Children that were emancipated, and those who remained under the Father's Power and Authority; between the Grandchildren by Sons, and those by Daughters; between the Relation by the Male Sex, which they called *Agnation*, and the Relation by the Female Sex, which they called *Cognition*. These differences, as to what concerns Successions, had given occasion for several Rules; so that by the ancient Law, the Children who were emancipated were excluded by their Brothers who remained in the Family under their Father's Power; the Children of Daughters were excluded from the Inheritance of their Grandfather by the Mother's side, by the Sons and their Children, and even by the Collateral Relations, who were of the number of the *Agnates*. But in progress of time these differences were very much moderated^a: and at last the Emperor

Justinian quite abolished these distinctions, and called indifferently to the Successions the Children who were emancipated, as well as those who remained under their Father's Power, and without making any difference of Sex, or Parentage by *Agnation*, or *Cognition*^b.

^a V. l. 1. §. 2. & 4. ff. de suis & legit. l. 9. c. cod. l. 12. cod. l. 14. C. de legit. hered. Tit. inst. de hered. quæ ab int. §. 14. & seq. & Tit. de Senat. Tertul. & de Senat. Orphit.

^b Nov. 118. c. 1. c. 4.

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2. The Children of the Children succeed by Representation with the Children of the first degree.
3. As also among themselves, altho' there be no Children of the first degree.
4. How the Children of different Marriages succeed.
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6. Portion of the Child which is not as yet born.
7. Curator to the Child that is in the Mother's womb.
8. Provision for the Widow big with Child.
9. Provision for the Child whose state is called in question.
10. The Descendants exclude the Ascendants from Successions.
11. Of the case where the Father and Son die at the same time.
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13. Children have the Right of Transmision.
14. Provision for the Children who deliberate whether they shall accept the Inheritance.
15. Fathers have the Usufruct of Successions which fall to their Children.
16. Rights which pass to those of the Family, who do not succeed to the Estate.

I.

IF the person who dies, whether it be a Man or Woman, leaves Children behind him, they shall succeed to him by equal Portions, without distinction of Sex, and without any difference between those who are emancipated, and those who have remained under their Father's Power; and if there is only one Child, Son or Daughter, he shall have the whole^a.

^a Recte

* Recte Prætor à liberis initium fecit ab intestato successionibus, ut sicuti contra tabulas ipsi desert, ita & ab intestato ipsos vocet. l. 1. §. 5. ff. si tab. test. nul. ex. unde lib.

Si quis igitur descendendum fuerit ei qui intestatus moritur, cujuscunque naturæ, aut gradus, five ex masculorum genere, five ex foeminarum descendens, & five suæ potestatis, five sub potestate sit, omnibus ascendentibus, & ex latere cognatis præponatur. Nov. 118. c. 1.

The cases in which there is a Right of Primogeniture are to be excepted out of this Article; and we must likewise except out of it the married Daughters, who have renounced their Right of Inheritance in favour of the Male Issue, or who without renouncing are excluded by some Customs. See the Preamble of the second Section of Heirs and Executors in general. This exclusion of the Daughters ceases when there are no Males, nor any descended of Males.

II.

2. The Children of the Children succeed by Representation with the Children of the first degree.

If besides the Children of the first degree, there should happen to be Children of other Sons or Daughters deceased, those Children of the second degree, or their Descendants, whether Sons or Daughters, in whatever degree they chance to be, would be called to the Succession, together with the Children of the first degree, to take the share in the Inheritance, which the person of whom they are descended would have had if he were alive; for they represent the said person, that is, take his place, and enter into his Right. Which is the reason that the Succession is divided among the Children of the first degree, and the Descendants of other Children deceased, not by the head, or in equal portions, according to the number of the persons who succeed, but by the Stocks; the Descendants of each Son or Daughter having no more among them all, than the portion which their Father or Mother would take if they were alive^b.

^b Si quem horum descendendum filios relinquentem mori contigerit, illius filios, aut filias, aut alios descendentes in proprii parentis locum succedere: five sub potestate defuncti, five suæ potestatis inveniantur. Tantam de hereditate morientis accipientes partem, quantumque sint, quantum eorum parens, si viveret, habuisset. Quam successionem in stirpes vocavit antiquitas. In hoc enim ordine gradum quæri volumus. Sed cum filiis & filiabus ex præmortuo filio aut filia, nepotes vocari sancimus: nulla introducenda differentia, five masculi, five foeminae sint; & seu ex masculorum, seu foeminarum prole descendant: five suæ potestatis, five sub potestate sint constituti. Nov. 118. c. 1.

This Right of Representation takes place in the direct Line of Descendants without limitation. But it has not place in the Line of Ascendants. See the fifth and sixth Articles of the first Section of the following Title. And as to the Representation among Collaterals, see the third, fourth, sixth, seventh and eighth Articles of the second Section of the third Title.

It may be observed in relation to this Right of Representation which Descendants have, that as it is agreeable to Natural Equity, so it is received in the Provinces

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of France which are governed by their Customs, as well as those which are governed by the written Law. However, there are some strange Customs, where the Descendants have not the Right of Representation. So that the Children exclude from the Succession of their Father, the Children of their own Brothers, the deceased's Grandchildren.

III.

If all the Children of the first degree³ being deceased, there should remain only Grandchildren by Sons or Daughters, these Grandchildren would succeed by representation of their Father or Mother. And altho' they should be all in a like degree, yet all the Children of each Son or each Daughter, let them be of never so great a number, would have no more among them all, than the portion which their Father or Mother would have had^c.

^c Nepotes ex diversis filiis varii numeri avo succedentes ab intestato, non pro virilibus portionibus, sed ex stirpibus succedunt. l. 2. C. de suis & legit. Nov. 118. c. 1.

IV.

If there are Children or Descendants of different Marriages, whether it be by the Father or Mother's side, all the Children of the same Father, and all those of the same Mother, succeed to them by equal shares, without distinction of the first or second Marriage^d.

^d Matris intestatæ defunctæ hereditatem ad omnes ejus liberos pertinere, etiam si ex diversis matrimoniis nati fuerint. l. 4. ff. ad Senat. Tertull. & Orphut. Ex rerum vero consequentia hoc ipsum & in patribus sit secundas nuptias facientibus. Nov. 22. c. 29.

V.

In the case of the foregoing Article, where Children succeed to their Father who has been more than once married, the Children of the first Marriage take out of his Estate before the Partition that which they ought to have in right of their Mother: and those of the second or other subsequent Marriage, if the Father has had more than two Wives, take likewise out of his Estate before the Partition, what belongs to them in right of their Mother. And if it is the Succession of a Mother who has had Children of different Marriages, those of each Marriage take out of it before the Partition that which they ought to have in right of their Father^e.

^e Si mulier ex pluribus matrimoniis liberos suscepit, singulis patrum sponsalitiæ largitates custodiendæ. l. 4. C. de secund. nupt.

Absolutely unauquæque soboles proprii parentis accipiat sponsalitiæ largitatem. Nov. 22. c. 29. Ex rerum vero consequentia hoc ipsum & in patribus

O o o o

tribus

tribus sit secundas nuptias facientibus. d. c. 29.
See the fourth Title of the third Book.

VI.

6. Portion of
the Child
which is not
as yet born.

If in the case of the Succession of a Father who leaves behind him one or more Children, his Widow should happen to be big with Child, the Child in the Mother's Womb would be reckoned among the Children of the deceased. And if the other Children should proceed to a Partition of the Estate, it would be necessary to lay aside one share for the Child that is to be born, and to name a Curator to it, who may take care of its interest, unless they should think it more convenient to delay the Partition until the birth of the Child, either by reason of the uncertainty whether the Child will be born alive or not, or because it may happen that there may be more Children than one of this birth.

Antiqui libero ventri ita prospexerunt, ut in tempus nascendi omnia ei jura integra reservarent, sicut apparet in jure hereditatum: in quibus, qui post eum gradum sunt agnationis, quo est id, quod in utero est, non admittuntur, dum incertum est an nasci possit. Ubi autem eodem gradu sunt ceteri quo & venter, tunc quæ portio in suspensio esse debeat, quaesierunt: ideo, quia non poterant scire quot nasci possunt. Ideo nam multa de ea re tam varia & incredibilia creduntur, ut fabulis adnumerentur. Nam traditum est & quatuor pariter puellas à matre familias natas esse. Alioquin tradidere non leves auctores, quinquies quaternos enim Peloponensi: multas Aegypti uno utero septenos. Sed & tergeminos Senatores cinctos vidimus Horatios. Sed & Lælius scribit, se vidisse in palatio mulierem liberam, quæ ab Alexandria perducta est, ut Hadriano ostenderetur, cum quinque liberis, ex quibus quatuor eodem tempore enixa (inquit) dicebatur, quintum post diem quadragesimum. Quid est ergo? Prudentissime juris auctores medietatem quandam secuti sunt, ut quod fieri non rarum admodum potest, intuerentur. Id est, quia fieri poterat ut tergemini nascerentur, quartam partem superstiti filio assignaverint. Τὰ γὰρ ἀπὸ τῆς ἡμιμέτης, id est, quod enim semel aut bis existit, ut ait Theophrastus, ἀπὸ τῆς ἡμιμέτης ἐν τοῖς νόμοις. Id est, præterierunt legislatores. Ideoque & si unum paritura sit, non ex parte dimidia, sed ex quarta interim hæres erit. Et si pauciores fuerint nati, residuum ei pro rata accrescere: si plures quàm tres decrescere de ea parte ex qua hæres factus est. l. 3. & 4. ff. si pars hæred. pet. v. l. 28. in fin. de judic. l. 36. ff. de solut.

The case mentioned in this Text of the birth of three Children at a time is so very rare, that it would be unreasonable to leave always three shares for the Children which may be born of a Widow who is left big with Child. And altho' it happens sometimes that there are two Children at a birth, yet this would not be a sufficient reason for laying aside always two shares, when an Inheritance is to be divided during the

time that a Widow is with Child, it would give too frequent occasion to make a new Partition. And the convenience is much less in making a Partition, when there happen two Children at a birth, than in making it every time that there is only one. But it is more convenient and more natural for the Children concerned in the Partition, to defer it till the Widow of the deceased is brought to bed, that they may see whether there is any live Child born or not, whether there are two, or only one. And if there should be only Daughters alive, in a case where the eldest Son was to have something by way of distinction, over and above his equal share with the rest, it would be necessary likewise to defer the Partition upon this account, that they might know whether it is a Son or a Daughter that is born. It is upon these considerations, that we have not followed the Rule explained in this Text, and that we have made it conformable to Equity, and to our Usage.

VII.

In the case of a Widow's being left big with Child, if it is necessary to do any thing for the security of the Rights of the Child that is to be born, whether it be in the case of a Partition, if it is necessary that one should be made, or for other causes, such as that of exercising the Rights, and managing the Goods which may belong to him, a Curator is named for these Functions; as has been said in its proper place.

Quoties autem venter mittitur in possessionem, solet mulier curatorem ventri petere, solet & bonis. l. 1. §. 17. ff. de vent. in poss. mitt. & cur. ei. See the fourteenth Article of the first Section of Curators.

VIII.

If in the case of the foregoing Article, the Widow should demand a Provision out of the Goods of the Inheritance, for her subsistence and maintenance during her being with Child, on the Child's account; this would be granted her in proportion to the quality of the persons, and the Goods of the deceased, altho' she should have an Estate of her own. For this provision being for a Child that is to be born, and which is to have its share in the Inheritance; both the Publick Interest, Humanity, and Religion do all of them require that even more care should be taken of it than of the Children that are already born. And this Provision would be taken out of the ready Money belonging

7. Curator
to the Child
that is in the
Mother's
Womb.

8. Provi-
sion for the
Widow big
with Child.

longing to the Inheritance, if there is any, or out of the other Effects which may be most easily, and most readily converted into Money^b. But if it should appear, that the Widow, in order to get this Provision, had feigned herself to be big with Child, she would be obliged to restore to the Heirs whatever she had received upon that account^c.

^b Mulier autem in possessionem missa, ea sola sine quibus fetus sustineri, & ad partum usque produci non possit, sumere ex bonis debet. Et in hanc rem curator constituendus est, qui cibum, potum, vestitum, tectum mulieri præstet, pro facultatibus defuncti, & pro dignitate ejus atque mulieris. Deminutio autem ad hos sumptus fieri debet, primum ex pecunia numerata: si ea non fuerit, ex his rebus quæ patrimonialia onerare magis impendio, quam augere fructibus consueverunt. l. 1. §. 19. & 20. ff. de ven. in poss. mitt. & curat. ejus.

Curator ventris alimenta mulieri statuere debet, nec ad rem pertinet an dotem habeat unde sustentare se possit: quia videntur, quæ ita præstantur, ipsi præstari qui in utero est. l. 5. eod.

Favorabilior est causa partus quam pueri. Partui enim in hoc favetur, ut in lucem producatur: puero, ut in familiam inducatur. Partus enim iste alendus est, qui non tantum parenti, cujus esse dicitur, verum etiam reipublicæ nascitur. l. 1. §. 15. eod.

^c Et si sciens prudensque se prægnantem non esse consumpserit, de suo id consumpsisse, Labeo ait. l. 1. §. ult. ff. de ventre in poss. mitt.

IX.

9. Provision for the Child whose state is called in question.

If in the same case there should be other Children of a former Marriage, or Heirs of Blood in default of Children, who should pretend that the Child which the Widow is big with, or which is already born, is not legitimate, so that it should be necessary to have a judicial determination, touching the state of this Child that is born, or to be born^d; during the time that this question remains undecided, the Child's Mother, or its Curator, might demand a provision out of the Goods of the Succession for its Alimony. And if the Law-suit should last a long time, the Allowance would be increased according to the Expence, including likewise therein that which is laid out on his Studies, and other necessary Expences according to the quality of the persons, and the greatness of the estate. For in such a controversy, we ought to presume during the time that it is undecided, both in favour of the Mother, that she has not been unfaithful to her Husband, and in favour of the Child, that it is legitimate; and it would be of a much worse consequence to have deprived the Child of its Nourishment and Education, if it should appear to be legitimate, than to have diminished the

Vo L. I.

Inheritance in so much as had been applied to that use, altho' it should be afterwards adjudged that the Child is not legitimate^m. Thus, this Allowance is not refused, altho' the state of the Child may appear doubtful, which it ought to be if it were evident that the Child had no manner of rightⁿ.

^l Si cui controversia fiet an inter liberos sit, & impubes sit causa cognita perinde possessio datur, ac si nulla de ea re controversia esset. l. 1. ff. de Carbon. edito.

We have left out the remaining part of this Law, which directs that the Judgment touching the state of this Child should be deferred until it has attained the Age of Puberty, unless, as it is said in the third Law, §. 5. of the same Title, it should appear to be for the Child's advantage not to have the Judgment delay'd; as if there should be danger of losing the proofs which might be of service to him. But if the other Children, or the Heirs who should controvert the state of this Child, should refuse to agree to such a delay, and to leave the Child in possession in the mean while, the Usage in France would not approve of such delay. And it would be just for the common interest both of this Child, and of its Adversaries, to have the question touching the state of the Child, decided with its Tutor, or Curator. And if the Cause should be determined against him, the Judgment which should be given, would be only as it were Provisional, and would not hinder him from applying afterwards to have it reversed, as well as every Minor who has not been sufficiently defended.

^m An autem vescendi causa deminuere possit is qui ex Carboniano missus est, videamus? Et si quidem satis impubes dedit, sive decrevit præses, sive non, deminuet vescendi causa: & hoc minus restituet hereditatis petitori. Quod si satisfacere non potuit, & aliter alere se videtur non posse, deminuendi causa usque ad id quod alimentis ejus necessarium est mittendus est. Nec mirum debet videri, hereditatem propter alimenta minui, ejus quem fortasse judicabitur filium non esse, cum omnium edictis venter in possessionem mittatur, & alimenta mulieri præstentur propter eum qui potest non nasci. Majorque cura debeat adhiberi ne fame pereat filius, quam ne minor hereditas ad petitorum perveniat, si apparuit filium non esse. l. 5. §. 3. ff. de Carbon. Ed. Non solum alimenta pupillo præstari debent, sed & in studia, & in cæteras necessarias impensas, debet impendi, pro modo facultatum. l. 6. §. 5. eod.

ⁿ Cause cognitio in eo vertitur, ut si manifesta calumnia appareret eorum qui infantibus bonorum possessionem peterent, non daretur bonorum possessio. Summatim ergo cum petitur ex Carboniano bonorum possessio debet prætor cognoscere. Et si quidem absolutam causam invenerit, evidenterque probatur filium non esse, negare debet ei bonorum possessionem Carbonianam. Si verò ambiguum causam, hoc est, vel modicum, pro puero facientem, ut non videatur evidenter filius non esse, dabit ei Carbonianam bonorum possessionem. l. 3. §. 4. eod.

Altho' this last text does not relate to the Provision for Alimony, but to the Inheritance it self, yet it may be applied to the one as well as to the other.

X.

If the deceased has left behind him 10. The De-Children, or only Grandchildren, and scendants if his Father, or Mother, or other A- exclude the scendants have survived him, his Chil- from Suc- dren, or Grandchildren of both Sexes, cessum. in what degree cœver they are, will

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exclude

exclude his Father and Mother; and they will likewise exclude from the Succession all other Ascendants, and much more all Collaterals. For it is the Natural Order, that Estates should go from Fathers to their Children^o.

^o Si matre superstite filius vel filia, qui quæve moritur, filios dereliquerit, omnimodo patri suo matrive ipso jure succedant. Quod sine dubio & de pronepotibus observandum esse censuimus. l. 11. C. de suis & legiti. lib.

Si quis igitur descendendum fuerit ei qui intestatus moritur, cujuslibet naturæ, aut gradus sive ex masculorum genere, sive ex foeminarum descendens, & sive suæ potestatis, sive sub potestate sit, omnibus ascendentibus, & ex latere cognatis præponatur. Nov. 118. c. 1.

XI.

31. Of the case where the Father and Son die at the same time.

Seeing the Son does not succeed to his Father but when he survives him, and since it may happen that they may both die together, so that it cannot be known which of them died first; it is necessary in this case to regulate who shall succeed to the Estate both of the one and the other. Thus, for instance, if it should happen that a Father and his Son had perished together in a Battel, or in a Shipwrack, and that it were impossible to know which of them had survived and succeeded, whether the Son had survived the Father, or the Father the Son, that the Estate of him who died first might go to the Heirs of the other; it would be presumed that the Son had survived and succeeded to the Father. And it would be the same thing if it were the Mother and the Son. For this being the Natural Order, it is supposed that the event has been conformable to it; and this presumption may be founded on this, that it is natural to think that by reason of the difference of age, the Son, being the most robust, has resisted Death the longest^p.

^p Cum bello pater cum filio perisset, materque filii quasi postea mortui bona vindicaret, agnati vero patris, quasi filius ante perisset, Divus Hadrianus credit patrem prius mortuum. l. 9. §. 1. ff. de reb. dub.

Cum pubere filio mater naufragio periit: cum explorari non possit, uter prior extinctus sit, humanius est credere filium diutius vixisse. l. 22. eod.

Si Lucius Titius cum filio pubere quem solum testamento scriptum heredem habebat, perierit, intelligitur supervivisse filius patri, & ex testamento heres fuisse: & filii hereditas successoribus ejus defertur, nisi contrarium approbetur. d. l. §. 4. See the following Article, with the remarks upon it. See likewise the fifteenth Article of the fourth Section of Proofs and Presumptions, and the remark upon it.

XII.

32. Of the case where the Mother

Altho' in the case of the preceding Article it is presumed, that the Father

died first; yet if for another case we should suppose, that it were a sucking Child who died with its Mother, whether it were in a Shipwrack, by Fire, or some other accident; it would be presumed, because of the weakness of the Child, that the Mother had lived longest. And the same thing would be presumed in every Child that has not as yet attained the age of Puberty, whether it be that the case had happened to the Son and the Mother, or to the Son and the Father^q.

^q Inter focerum & generum convenit: ut si filia mortua superstitem anniculum filium habuisset, dos ad virum pertineret: Quod si vivente matre filius obiisset, vir dotis portionem uxore in matrimonio defuncta restitueret. Mulier naufragio cum anniculo filio periit. Quia verisimile videbatur ante matrem infantem periisse, virum partem dotis retinere placuit. l. 26. ff. de pact. dotat.

Si mulier cum filio impubere naufragio periit, priorem filium necatum esse intelligitur. l. 23. ff. de reb. dub. Quod si impubes cum patre filius perierit, creditur pater supervivisse, nisi & hic contrarium approbetur. l. 9. in f. eod.

It is necessary to remark on this and the foregoing Article, that these Rules appearing to be founded on the presumptions of what naturally happens, it would seem that they ought to be fixed, and always the same in all sorts of cases without distinction. That is to say, that whatever the consequence might be either for or against those who have any interest whether the Father or Son died first, and without any regard to the consideration which the interest of one of the Parties might deserve above that of the other; we ought always to judge in the same manner. Nevertheless we see in some Laws, that in these sorts of cases, where it is not known which of the two died first the presumptions are different, according to the consideration of the persons concerned. Thus, for example, in the case mentioned in the first of the texts cited on the preceding Article, where the question was, whether the Relations of the Father ought to inherit his Estate; which would have been just, if he had survived his Son, or whether the Mother ought to inherit the Father's Estate, as having past to the Son, if he died only after his Father, the Emperor Adrian decided in favour of the Mother, that the Son had survived his Father. Thus, on the contrary in a like case, where a person who had been set free from Slavery, died together with his Son by the same accident, so that it was uncertain if either of them, or which of them did survive, another Law

Law presumes in favour of the Patron; that is, of the Master who had given this person who had been a Slave his freedom, that the Son had not survived his Father, that the Father's Inheritance might go to the Patron^a; for he had right to succeed to the person whom he had made free from Slavery, and who died without Children. And this Law prefers him to the person who ought to be Heir to the Son, unless it were clearly proved that the Father died first: *Si cum filio suo Libertus simul perierit, intestati patrono legitima defertur hereditas; si non probatur supervixisse patri filius.* These are the words of this Law, which explains afterwards the motives of this decision, founded on the consideration of the person of the Patron. *Hoc enim reverentia patronatus suggerente dicimus.*

^a L. 9. §. 2. ff. de reb. dub.

We see also that in a like event of a Father and a Son having perished together in a Shipwreck, or by some other accident, another Law presumes under another view, that the Son did not survive the Father. It is in the case where a Testator had required his Heir to restore his Estate, or a part of it, or some particular thing, to another person after the death of this Heir, if he should die without Children. It is said in that Law, that if the person who was charged with this Fiduciary Bequest^b, having only one Son, this Son and his Father had died at the same time by some accident, so that it was impossible to know which of them had survived; it would be presumed that the Son had not survived, and that therefore the case of the Fiduciary Bequest had happened, the person who was charged with it having died without Children. Which would make the Estate to go to the person for whose benefit the Fiduciary Bequest was devised; whereas had it been presumed that the Son had survived, it would have made the case of the Fiduciary Bequest to cease; and the Son having succeeded to his Father, he would have transmitted the Estate to his Heir. *Si quis suscepit quidem filium, verum vivus amiserit, videbitur sine liberis decessisse. Sed si naufragio, vel ruina, vel aggressu, vel quo alio modo simul cum patre perierit (filius) an conditio, si sine liberis pater decederet, defecerit videamus, & magis non defuisse arbitror. Quia non est verum filium ejus supervixisse. Aut igitur filius supervixit patri, & extinxit conditionem fideicommissi: aut*

non supervixit, & extitit conditio. Cum autem quis ante & quis postea decesserit non apparet, extitisse conditionem fideicommissi magis dicendum est. l. 17. §. 7. ff. ad Senat. Trebell. It would seem as if we might reasonably conclude from this Decision, that since it presumes contrary to the Natural Order, and against the Rule explained in the eleventh Article, that the Son did not survive his Father, it is founded only on the favour of the Fiduciary Bequest, to make it subsist against the Heir of the Son. And since it was sufficient for the person who was to be benefited by the Fiduciary Bequest, that the Son had not survived, whether he died before his Father, or only in the same moment with him^c; the Law barely supposes that the Son did not survive, and that therefore the condition of the Fiduciary Bequest was come to pass, which accomplishes the intention of the Testator, which was to prefer no body to the person who was to be benefited by the Fiduciary Bequest, but the Children of his Heir, in case he should have any who should succeed him.

^b This is the name which is given to these sorts of Dispositions: Which we shall treat of in the fifth Book.

^c Aut non supervixit filius, & extitit conditio. d. l.

It appears from all these several questions which arise from the case where the Father and Son die together, that the Laws decide differently touching the order of their death, according to the differences of the persons concerned, judging in favour of the Mother, that the Father died first; deciding on the contrary in favour of the Patron, that the Son did not survive; and in favour of the Fiduciary Bequest, that the condition on which it was left has happened, by the Father's dying without leaving any Children alive behind him. And in this last case, it is not the favour of the person for whose benefit the Fiduciary Bequest is left, that occasions this Decision, but barely the quality of its being a Cause relating to a Fiduciary Bequest, which was singularly favourable in the Roman Law. But if in the same case of this Fiduciary Bequest, it were the Widow of the Father, and Mother of the Son who died together, who should pretend that according to the Rule of the eleventh Article, and the Order of Nature, her Son had outlived his Father, and that therefore the condition of the Fiduciary Bequest had not happened, since the Father having died the

the first, he did not die without Children; would it be presumed against the Mother in favour of him who was to have the benefit of the Fiduciary Bequest, that the Son had survived his Father, and would it not be just on the contrary, to presume in favour of the Mother, that the Son had lived longest; seeing the Mother would have for her on one side, the natural presumption that the Son ought to survive the Father, and on the other side, the favour of her quality of Mother, which, according to the spirit of the Laws which we have just now quoted, would seem to decide in her favour? The consequence seems to be very well grounded, and in order to judge the better of it, it may be remarked, that there results from the Laws which we have quoted, and from others relating to this subject, three different manners of decision in cases of this nature. The first, which supposes that according to the Order of Nature the Son has survived the Father: the second, which makes an exception to this first in the cases of a Child who is under the years of Puberty: and the third, which supposes that the Father and Son died in one and the same moment. And it is very certain that one of these cases must of necessity happen; that is to say, either that the Father dies first, or that he dies last, or that both the one and the other die the same moment. It may be said of the third of these three kinds of Presumption, that it ought to be abolished, if it were the Rule to presume always that the Son who is adult survived the Father, and that the Father survived the Son that was under the age of fourteen years. For by this Rule we ought never to presume, that both of them died in the same instant; and all the questions would be decided by the age of the Son. Since therefore it is certain that the Laws presume sometimes that the Son, even altho' he be of the age of fourteen years, has not survived; it follows from thence that those Laws suppose that it may naturally happen, either that the Son dies first, or that both the one and the other die in the same instant; and this is likewise a Truth which Reason sufficiently convinces us of. For it may happen several ways, that the Mother may perish under the Ruines of a Building sooner than the Child whom she suckles. It may happen that a Son may be killed in a Battel before his Father; and on the same occasions, and likewise on all others, it may so fall out, that they both

die in the same instant, or that even he who by reason of his age, or some other infirmity, might be presumed to die first, does nevertheless die the last. It is upon this natural diversity of events that the different manners in which the Laws decide Questions of this nature are founded, presuming sometimes that the death of both has happened in the same instant, as it may fall out, and at other times that one of the two died first, not by the presumptions of the equality or difference of their Ages, or of other causes, but by presuming that that has happened which may be most advantageous to the party whose Cause is most favourable. For whereas if we knew certainly the truth of the event, whatever it were, it would be necessary to decide conformably thereto; the uncertainty of what has happened when we can have no proofs of it, makes the Law to determine with Authority that that has happened which the natural bias seems to demand, as appears by the Examples which we have just now explained. And this manner of deciding may have its foundation in a principle of Equity which is very natural; for seeing it is impossible on one side to know the truth, and necessary on the other side to come to some decision, which cannot be made but by supposing one of the cases which may happen, there is only the Law which can substitute its Authority, in the place of the Decision which the Truth would make, if it were known. It is in this manner that we ought to reconcile those Decisions which are so different; whence it seems to follow, that in the Questions of this nature, we ought to join to the knowledge of the matter of fact, such as it may be gathered from the circumstances, the consideration of the persons concerned, that we may decide the matter by all these views pursuant to the principles which result from the reflections on all the said Laws.

If in order to make application of these Principles, we suppose that a Father, and his only Son of about thirteen years of age, having died together, the Widow, Mother of the said Son, demands the Goods of the Father, together with those of the Son, pretending that the Son out-lived the Father, and consequently succeeded to him: and that the Collateral Relations of the Father demand his Inheritance, and likewise over and above that which the Father was intitled to out of the Goods of the Son; and ground their pretention on this,

If the Son not having as yet years of age, we ought to presume that the Father out-lived him. Now ought this Question to be decided? It will be adjudged that the Son, because of his tender age, died the first, and that therefore the Mother is to have no share in the Goods of her Son? Or will it be presumed, in favour of the Mother, that the Son has survived the Father? And even altho' it were a Child of much younger years, would the Mother be deprived of that which she ought to have, if it were certain that her Son had survived, since it may even have happened that the Father died before the Son, by reason of other circumstances besides that of age, which is not a certain proof that the Son died first? Or would it be supposed rather that both the one and the other died in the same instant, in order to give to the Mother the Estate of her Son, whom the Father did not survive, and to the Collateral Relations the Father's Estate, to which the Son did not succeed, he not having survived the Father? The first of these three ways of deciding this Question would appear too hard. And since it is possible that the Son may have survived, it would seem that we ought not to decide the doubt by the contrary supposition, which deprives the Mother of all manner of share in the Goods of her Son which came to him by his Father; which consideration will be an inducement for deciding the doubt according to the second manner; since the third would still have this hardship in it, that the Mother would be thereby deprived of that which even the Customs which appropriate the Goods to those of the Stock from whence they came, give her out of the Goods which the Son has inherited of his Father.

If we suppose for another case, that a Father who had several Sons dies with one of them, so that it cannot be known which of them died first, and that this Son having some Estate of his own, had made a Testament, and therein named one of his Friends his Universal Heir, and that the Brothers coming to divide among them their Father's Estate, this Heir of their Brother should pretend that the Son had survived the Father, and that therefore he ought to have not only the Goods belonging to this Son, but likewise the share which fell to him of his Father's Estate. Would this question be decided in favour of this Heir, by presuming that the Son died last; or would it be determined in fa-

vour of the Brothers, upon the presumption that they died both in the same instant, and that so the Brother's Heir has no share in the Goods of the Father, and that he ought to take only the Goods which their Brother may have had some other way? This Heir would be founded on the presumption that the Son had survived and succeeded his Father; and the Brothers would have to urge on their side, not only the consideration which is so very favourable of the Natural Equity which calls them to succeed to their Father's Estate, and which excludes this Stranger from it; but likewise this reason, that there being no manner of proof to shew which of the two died first, nor any reason to presume in favour of the Stranger, against the interest of the Brothers; it ought to be presumed that both the one and the other died in the same instant, with as much or rather more reason than in the case of the Fiduciary Bequest which has been spoken of. So that according to the Principles which we have just now been enquiring into, it would be enough for this Heir, that he should have the proper Goods of the Son, without having any share in those which the Son would have inherited of his Father, if it had been certain, as it is not, that he did survive him.

We might give other Examples of the like cases, but these few are sufficient for a matter which so rarely happens; and it is enough to have taken notice of these several Principles, which seem to be sufficient for all the different cases of this nature.

V. l. 32. §. 1. ff. de religiof. & sumpt. fun. l. 9. §. 1. ff. de reb. dub. d. l. §. ult. l. 16. cod. d. l. 16. §. 1. l. 17. & 18. cod. d. l. 18. §. 1.

It appears by these texts, the words whereof we have not set down here, that the ordinary presumption is that the two died in the same instant, since it cannot be said of any one of them, that he survived the other. So that it is only by circumstances, or upon particular considerations, that the contrary is presumed.

See the fifteenth Article of the fourth Section of Proofs and Presumptions, the seventh Article of the second Section of Pupillary Substitution, and the eighteenth Article of the first Section of Substitutions, direct and fiduciary.

XIII.

Children and other Descendants are considered as being in some manner Masters of the Estate of their Father or Mother, Grand-father or Grand-mother, and other Ascendants, even before their death. And when that does happen, it is not so much a Succession which the Children acquire, as a continuation of a Right which they had already, with this difference between this Right and the Inheritance, that

^{13.} *Children have the Right of Transmissi-
on.*

that whereas during the life of the Ascendant to whom they succeed, they had his Estate as it were in Partnership with him, and that his Possession preserved it to them; they have now all alone the sole and entire Right to the Estate after his death. Thus, altho' they should know nothing of his death, and even altho' they should be ignorant of their own Right, as if they should happen to be young Children, yet the Estate would be entirely theirs¹. Which has this effect, that if the Son who has survived his Father, and who has not renounced the Succession, happens to die before he has entered to it, or even before he knows that it is fallen to him, he would transmit, that is to say, would make his Right to pass to his Heirs. And this is what is called the Right of Transmission, of which we shall speak in its proper place².

¹ In suis hereditibus aditio non est necessaria, quia statim ipso jure heredes existunt. l. 14. ff. de suis & legit. hered.

In suis hereditibus evidentius apparet continuationem domini eo rem perducere ut nulla videatur hereditas fuisse quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur. l. 11. ff. de lib. & post. Sui autem heredes fiunt etiam ignorantes. §. 3. inst. de hered. qua ab int.

Et statim a morte parentis quasi continuatur dominium. d. §.

Altho' this word suis heres does not agree to all Children in the Roman Law, and that Children emancipated from their Father's Power lost this quality, yet these Texts are nevertheless conformable to the Usage in France, which does not make this distinction between Children in matters of Succession, and which, even under the Roman Law it self, was abolished by Justinian. V. Nov. 118. c. 1.

² See the tenth Section of Testaments.

XIV.

14. Provision for the Children who deliberate whether they shall accept the inheritance.

Although Children and other Descendants, who survive their Fathers and Mothers, and others their Ascendants, are seized of their Estate, as has been said in the preceding Article, yet they have nevertheless the liberty to deliberate whether they will accept the Inheritance, or whether they will abstain from it. And if during the time that is given them for deliberating, they demand some Allowance for their subsistence, it is granted unto them, as has been said in another place³.

³ See the sixth Article of the first Section of Heirs or Executors with the benefit of an Inventory.

XV.

15. Fathers have the Usufruct of Successions which fall to their Children.

It is necessary to remark in relation to the Successions of Ascendants which go to their Children, and other Descendants, that they have not always a full and plenary Right to them. For if the Son who is under his Father's Authori-

ty succeeds to his Mother, or other Ascendant by the Mother's side, his Father shall have the Usufruct of the Goods of that Succession, as shall be explained in the following Title⁴.

⁴ See the second Section of the following Title.

XVI.

We must likewise observe upon the same subject of the Succession of Children and other Descendants, and likewise in general touching all Successions of Intestates, whether they be Descendants, Ascendants, or Collaterals, that there may be in the Inheritance certain Rights which go to the Heirs of Blood, altho' they be deprived of the Succession by a Testament, or even that they renounce it. Thus the Right of Patronage annexed to a Family, passes to those to whom the Title gives it, although they do not succeed to the Estate⁵. Thus the Right of being interred in the Burying-place of the Family, passes equally to those who are of the Family, whether they Inherit the Estate, or not⁶.

⁵ Filii hereditate paternâ se abstinentes, jus quod in libertis habent paternis, non amittunt. l. 9. ff. de jur. patron. l. 47. §. 4. ff. de bon. libert.

Altho' the Right of Patronage which is spoken of in this Article be of a different nature from that mentioned in this Law, yet it may be applied to it, seeing these two Rights have one and the same name, and that the one as well as the other goes to the nearest Relations, altho' they do not succeed as Heirs to the Estate. The Patronage spoken of in this Article, is the Right which the Church has granted to the Founders of some Benefices, and their Descendants, to present to the Ordinary who has the Right of Institution, persons who are capable. Which is a matter that does not come properly within the design of this Book.

⁶ V. l. 6. ff. de relig. & sumpt. fun.

SECT. III.

Of the Lines and Degrees of Proximity.

Although the subject matter of this Title be limited to that which concerns Children and other Descendants, and that it may seem for that reason that we ought to speak here only of the Lines and Degrees of Descendants; yet the connexion there is between the Lines and Degrees of Ascendants, Descendants and Collaterals, does not allow this matter to be divided; but seeing we are about to explain here the Lines and Degrees of Descendants, it is proper likewise to join the others.

Seeing these Lines and Degrees of Proximity, or Consanguinity, are more easily distinguished in a Figure, we have inserted

inserted one at the end of this Section. But it is necessary beforehand to explain what is meant by Degrees of Proximity, and by the Lines which the said Degrees compose; for it is by those Lines and Degrees that we see what is the Proximity between two persons; and this shall be the subject matter of this Section.

The knowledge of the Degrees of Proximity is not only necessary in the matter of Successions, but likewise in other matters; as in Tutorships, that those may be named Tutors who are related to the Minors, and those excused who are not: in the Challenges or Recusations of Judges who are Relations: in the admission of Witnesses, either in Civil or Criminal Causes, in order to receive or reject the Testimony of those who are related to the Parties: in Marriages, which are unlawful between those that are within certain degrees of Relation or Affinity^b.

^a Jurisconsultus cognatorum gradus & affinium nosse debet. Quia legibus hereditates & tutelæ ad proximum quemque agnatum redire consueverunt. l. 10. ff. de gradibus & affin. Præterea legibus judiciorum publicorum, contra affines & agnatos testimonium inviti dicere non coguntur. d. l.

^b Nemini liceat contrahere matrimonium cum filia, nepte vel pronepte, itemq; cum matre, avia, vel proavia: & ex latere amita ac matertera, sorore, sororis filia, & ex ea nepte: præterea fratris tui filia, & ex ea nepte. Itemque ex affinibus, privigna, noverca, nuru, socru, cæterisq; quæ jure antiquo prohibentur à quibus cunctos volumus se abstinere. l. 17. C. de nuptiis.

The Prohibitions of Marriages within the Degrees of Proximity and Affinity, which had been established by the Roman Law, have been very much enlarged by the Canon Law, which is observed in France^c. But this matter does not belong to this place; for here it sufficeth to point out the Order of the Degrees of Kindred in so far as concerns Successions. And as for the Degrees of Affinity or Alliance, as the same have no relation to Successions, Allies by Marriage having no manner of Right to inherit, we shall say nothing of them^d. The Degrees of Affinity are sufficiently distinguished by those of Proximity; for in order to know the Degree of Affinity between the Husband and the Relations of his Wife, and between the Wife and the Relations of her Husband, there is no more required but to place the Husbands in the same Degree in which their Wives are, and the Wives in the same Degree with their Husbands.

^c V. 35. q. 4.

^d Affinitatis jure nulla successio permittitur. l. 7. C. de success.

Seeing all the Articles of this Section have relation to the Figure of Kindred which is placed at the end of it, and that without the sight of the said Figure it will be difficult for beginners to understand aright all this detail; they are to take notice that it will be convenient for them to have the Figure before them at the reading of each Article, and before they look into it to read the Advertisement which we have set down at the end of this Section, for the right understanding the use of the said Figure.

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2. What are the Lines of Consanguinity.
3. Line of Ascendants.
4. Line of Descendants.
5. Line of Collaterals.
6. Divers Lines of Ascendants and Descendants.
7. Lines of Ascendants by the Father's side and Mother's side.
8. Multiplication of Ascendants, and their Lines.
9. Difference between the Lines of Ascendants and those of Descendants.
10. Divers Lines of Collaterals.
11. Three Orders of Collaterals.
12. The Proximity of the Degrees of Collaterals is not regulated by the Order of the Lines.
13. Situation of the Lines of Collaterals.
14. Two ways of counting the Degrees, one according to the Roman Law, and the other according to the Canon Law.

I.

Seeing Proximity between two persons proceeds either from this, that they are descended one from the other, which makes the connexion between Ascendants and Descendants, or from their being both descended of one and the same person, which makes that of Collaterals; we judge therefore of the Proximity between two persons by the number of Generations which make both the one and the other of the said connexions. And these Generations are called Degrees, by which we step from one person to another, in order to make the computation of their Kindred^a, in the manner which shall be explained in the following Articles.

^a Gradus dicti sunt à similitudine scalarum locorumve proclivium, quos ita ingredimur, ut à proximo

ximo in proximum, id est, in eum qui quasi ex eo nascitur, transeamus. l. 10. §. 10. ff. de grad. & affin.

II.

2. What are the Lines of Consanguinity.

By Lines of Consanguinity is meant the Succession of Degrees or Generations which are between one person and another. And as there are three Orders of Proximity, that of Ascendants, that of Descendants, and that of Collaterals, so there are likewise three Orders of Lines^b.

^b Gradus cognationis alii superioris ordinis sunt, alii inferioris, alii ex transverso sive à latere. Superioris ordinis sunt, parentes: inferioris liberi: ex transverso sive à latere, fratres & sorores, liberique eorum. l. 1. ff. de gradib. & affin.

III.

3. Line of Ascendants. In the Order of Ascendants of the person whose Relation we want to know, we place above him his Father, his Grand-father, his Great Grand-father, and his other Ancestors, each of them in their rank according to their Degrees, and the first Degree is that which ascends from the Son to the Father, the second from the Father to the Grand-father, the third from the Grand-father to the Great Grand-father, and so on successively with the others, according to the same Order. Thus the Father is in the first degree to his Son, and the Grand-father in the second degree to the Grand-son, and so on with the rest. It is these Degrees whereof the situation one above the other makes the Line of Ascendants, which, being joined with that of the Descendants, of which we shall speak in the following Article, makes together only one Line^c.

^c Primo gradu sunt, supra pater, mater. l. 1. §. 3. ff. de grad. & affin.

Secundo gradu sunt, supra avus, avia. d. l. §. 4.

Tertio gradu sunt, supra proavus, proavia. d. l. §. 5.

IV.

4. Line of Descendants.

In the Order of Descendants of the person whose Relation is in dispute, we place under him his Son, his Grand-son, and the other Descendants, every one in his Rank according to their Degrees; the first of which is that which descends from the Father to the Son, the second from the Son to the Grand-son, the third from the Grand-son to the Great Grand-son, and the others in the like manner, according to the same Order. Thus the Son is in the first degree to the Father, and the Grand-son in the second degree to the Grand-father, and so on with the rest^d. It is these de-

grees whereof the situation one under the other makes the Line of Descendants, which as has been said in the preceding Article, makes together one Line with that of the Ascendants.

^d Primo gradu sunt—infra filius, filia. l. 1. §. 3. ff. de gradib. & affin.

Secundo gradu sunt—infra nepos, neptis. d. l. §. 4.

Tertio gradu sunt—infra pronepos, proneptis. d. l. §. 5.

V.

In the Order of Collaterals, there is this difference that distinguishes it from the Orders of Ascendants and Descendants, that whereas there is only one Line of Ascendants and Descendants, there are as many Lines of Collaterals as there are places of Ascendants and Descendants, including therein the place of the person whose Kindred we enquire into. For at his side are his Brothers, at his Father's side are his Uncles; at his Son's side are his Nephews, and so on with the others in several Lines both ascending and descending, as shall be explained in the tenth and following Articles, and as appears plainly enough by the Figure. These are the Lines which are called Collateral, because they are at the side of the direct Line of Ascendants and Descendants. So that in order to reckon the degrees of Kindred between two Collateral Relations, it is necessary to find in the direct Line the first of the Descendants that is common to them, that is, the first of whom both the one and the other are descended, and then to count the degrees which ascend from one of them to that common Parent or Ascendant, and those which from that Ascendant descend to the other. Thus between two Brothers there are two degrees: the first, which ascends from one of the Brothers to their Father; and the second, which descends from the Father to the other Brother. Thus there are four degrees from one Cousin German to another, two which ascend from one of them to his Father and Grand-father, and two which descend from the said Grand-father to the other Cousin. And it was in this manner that Proximity was reckoned among those persons in the Roman Law, placing the Brothers in the second degree, and the Cousin Germans in the fourth. But by the Canon Law, which is observed in France, as has been said in the Preamble of this Section, the same degrees are considered under another view, and the computation is made in another way by placing Brothers in the first

5. Line of Collaterals.

infer. C. In Germans in the second. For they are compared among themselves according to their situation under the common Parent or Ascendant. Thus the two Brothers are in the first degree under their Father, and the two Cousin Germans are in the second degree under their Grand-father. We shall see in the tenth and following Articles what relates to the other Collaterals; but this difference between the Canon and Civil Law is only in the Collateral Line; for as to the Ascendants and Descendants, the degrees are the same in both Laws.

* Secundo gradu sunt—ex transverso frater, soror. l. 1. §. 4. ff. de gradib. & affi.

Since by the manner of counting the degrees according to the Roman Law, the Brothers are in the second degree, and that they are the first and nearest in the Order of Collaterals, it is therefore said that in that Order there is no first degree. Superior quidem & inferior cognatio à primo gradu incipit. Ex transverso, five à latere, nullus est primus gradus, & ideo incipit à secundo. d. l. §. 1.

Quarto gradu sunt—fratres patruales, sorores patruales: id est, qui, quæve ex duobus fratribus progenantur. Item consobrini consobrinæ; id est, qui, quæve ex duobus sororibus nascuntur, quasi consororini. Item amitini, amitinae, id est, qui quæve ex fratre & sorore propagantur. Sed ferè vulgus istos omnes fratres communi appellatione consobrinos vocant. d. l. §. 6. l. 10. §. 15. eod.

VI.

6. Divers Lines of Ascendants and Descendants.

Although we reckon only one Line of Ascendants, and one of Descendants, which between them make no more than one Line, which ascends from the Children to the Fathers, and descends from the Fathers to their Children, and is called direct; yet each of these two Orders of Ascendants and Descendants has under other views several Lines, which are to be distinguished for divers uses. For whereas, for example, it is necessary to consider only one Line of Ascendants and Descendants on the Father's side, when the question is to compute the degrees from Father to Son between an Ascendant and a Descendant; yet if we will distinguish the Ascendants on the Father's side and on the Mother's side of one and the same person, and his Descendants of Sons and Daughters, there are several Lines, as shall be explained in the three following Articles.

* This is a consequence of the first Article.

VII.

7. Lines of Ascendants by the Father's side

If we will reckon all those who are in the Order of Ascendants of any person, there is first a Line which ascends from that person to his Father, to his

Grand-father by the Father's side, to his Great Grand-father by the Father's side, and to the other Ascendants from Father to Father: and there is another Line which ascends from the same person to his Mother, to his Grand-mother by the Mother's side, and so on to the others from Mother to Mother. But these Lines not containing all the Ascendants, there are several other Lines to be imagined, in order to comprehend them all, as shall be explained in the Article which follows.

* This is likewise a consequence of the first Article.

VIII.

To understand aright the Order of those other Lines of Ascendants, besides the two which have been mentioned in the preceding Article, it is necessary to consider that the number of Ascendants increases always the double at every degree. Thus, every one has in the first degree only his Father and his Mother, and in the second he has his Grand-father and Grand-mother by the Father's side, and likewise his Grand-father and Grand-mother by the Mother's side. So that whereas in the first degree there are only two persons, there are four in the second, and in the third there are eight, which are the Father and Mother of the Grand-father by the Father's side, the Father and Mother of the Grand-mother by the Father's side, the Father and Mother of the Grand-father by the Mother's side, and the Father and Mother of the Grand-mother by the Mother's side. And according to this Order, in mounting always to the Ascendants of each person, we shall go by several Lines which branch out at each Generation. And by this progression we shall find sixteen persons in the fourth degree, thirty two in the fifth, sixty four in the sixth, one hundred twenty eight in the seventh, and so on with the rest. Which would make above thirty millions of persons in the five and twentieth Generation in ascending. So that by continuing we should find in much fewer Generations than what have been since the first Man, many more Ascendants of each person than there have been Men since the Creation. But as many of the Ascendants of one person are descended from the same Ancestors, the Lines which were branched out, join together again at the first common Ascendant, from whom the others were descended. Thus, this multiplication being often interrupted

rupted by these common Ascendants, ceases and is reduced in such a manner, that we come at last to the only common Ascendant from whom all Mankind is descended.

^a Tritavi, itemque tritavix pater mater personas efficiunt centum viginti octo. l. 10. §. 18. ff. de gradib. & affin.

Admonendi sumus parentum personas semper duplicari: avum enim & aviam tam maternos, quam paternos intelligimus. l. 3. §. ult. eod.

IX.

9. Difference between the Lines of Ascendants and those of Descendants.

There is this difference between the Lines of Descendants and the Lines of Ascendants, that these are the same for all persons; for every one has the same Order of Ascendants that any other has, altho' the number of the Ascendants of all persons is unequal, according as they have more or fewer common Ascendants in the sense explained in the preceding Article. But it is not the same thing with respect to the Lines of Descendants; for these Lines branch out, and are divided differently according to the number of the Children and Descendants; and they end or are extended more or less, according as the Generations cease or are continued. So that in many Families all their Descendants come to an end, and in many others their Posterity will remain to the end of the world. Thus the Lines of the Descendants of each Family are diversified. But if we want only to see the Degrees or Generations between one single Ascendant, and one single Descendant, from Father to Son, there is no occasion to imagine more than one Line, whatever number of Degrees there may be between the two¹.

¹ This is a consequence of the foregoing Articles.

X.

10. Divers Lines of Collaterals.

As there are several Lines of Ascendants and Descendants, in the sense explained in the preceding Articles, altho' we reckon only one when we count the degrees from an Ascendant to a Descendant, or from a Descendant to an Ascendant; so we may also distinguish several Lines of Collaterals, according to the several degrees which they take up¹, as shall be explained in the Articles which follow.

^a See the following Articles.

To understand aright this and the following Articles, it is necessary to have the Figure before us.

XI.

11. Three Orders of Collaterals.

In order to make the knowledge of these several Lines of Collaterals easier,

and to avoid confusion therein, we may distinguish the said Lines into three Orders. The first contains only one Line, which is that wherein are placed Brothers, Cousin Germans, second Cousins, and the other Cousins who are at the side of the person whose Kindred we enquire into, and in such a manner that they are all of them in an equal distance with the said person from the Ascendants that are common to them. The second Order contains several Lines which are above that of the Brothers: and in the first of the said Lines are the Uncles, in the second the Great Uncles, and so on with the others, ascending from Line to Line. And in each Line at the side of the Uncles and Great Uncles, and of the others upwards, are the Cousins, who are at a less distance than this person from their common Ascendant. And the third Order of these Lines contains also several Lines which are underneath that of the Brothers: and in the first of the said Lines are the Nephews, in the second the Sons of Nephews, and so on with the others, descending from Line to Line. And in each of these Lines at the side of the Nephews and Sons of Nephews, and the others downwards, are the Cousins, who are farther removed than this person from their common Ascendant. Thus all the Collaterals are comprehended in the several Lines of these three Orders, under the names of Brothers, Uncles, Nephews, and Cousins of both Sexes^m.

^m See the Figure, and the eighth, ninth, and tenth Articles of the first Section of the third Title.

XII.

This distinction of three Orders of the Lines of Collaterals has not this effect, that all those of one Line are either nearer or remoter from the person whose Relations we enquire into, than all those of another Line; but, excepting the Brothers, there are some in each Line who are nearer to this person than some in all the other Lines; and there are likewise in each Line some who are more remote from the same person than some in all the other Lines. Thus, the Uncle who is in the first Line of the second Order, and the Nephew who is in the first Line of the third Order, are nearer than the Cousin German, who is in the Line of the first Order. And it is easy to see by the Figure, the different Proximities of all the Lines of these several Orders.

12. The Proximity of the Degree of Collaterals is not regulated by the Order of the Lines.

^a See the Figure.

XIII.

Of these three Orders, the first which begins with the Brothers, has only, as has been said, one Line which crosses that of the Ascendants and Descendants, in the point where the person whose Kindred we enquire into is placed. But as to the other two Orders, the one has as many Lines as there are Ascendants, and the other as many as there are Descendants. And of all those Lines which are parallel to those of the Brothers, those of the second Order are above, and every one of them crosses the place of one of the Ascendants. And the Lines of the third Order are underneath, and each of them crosses the place of one of the Descendants. Thus we may observe this difference between the said three Orders, that in the first, which has only one Line, all those who are in it, and the person whose Kindred we search into, are equally distant from the Ascendants whom they have in common. That in the second, which is composed of the Lines that cross the places of the Ascendants, all those who are in it, are nearer to the common Ascendants than the person whose Kindred is in question. And that in the third Order, which is made up of the Lines which cross the places of the Descendants, all those who are in it are more remote than this person from the Ascendants that are common to them^o.

^o See the Figure.

XIV.

14. Two ways of counting the Degrees, one according to the Roman Law, and the other according to the Canon Law.

According to these Orders of Collaterals, to count the Degrees of Kindred between two persons, as they were computed in the Roman Law, we need

only to follow the Generations from one to the other, as has been said in the fifth Article, mounting from one of the two to their common Ascendant, and descending to the other. Thus, between one and his Brother there are two Degrees, as has been explained in the same Article. Thus, between one and his Uncle there are three Degrees, two which ascend from this person to his Grand-father, who is their first common Ascendant, and a third which descends from the Grand-father to the Uncle. And by this computation the Brothers, as has been said, are in the second Degree to one another, and the Uncle and Nephew are in the third^p. But according to the Canon Law, the two Brothers are in the first Degree, and the Uncle and Nephew in the second. For among Collaterals the Rule is, that those who are equally distant from their common Parent or Ascendant, are in the same degree of distance from one another that each of them is from the common Ascendant; and that those who are at unequal distances from their common Ascendant, are in the same Degree to one another that the person who is most remote from that Ascendant is to the said Ascendant^q. Which makes the computation of all the Degrees of Collaterals very easy.

^p Tertio gradu sunt — ex transverso, fratris, sororisq; filius, filia, &c. convenienter patruus, amita, avunculus, matertera. l. 1. §. 5. ff. de gradib. & affin.

^q See the Figure.

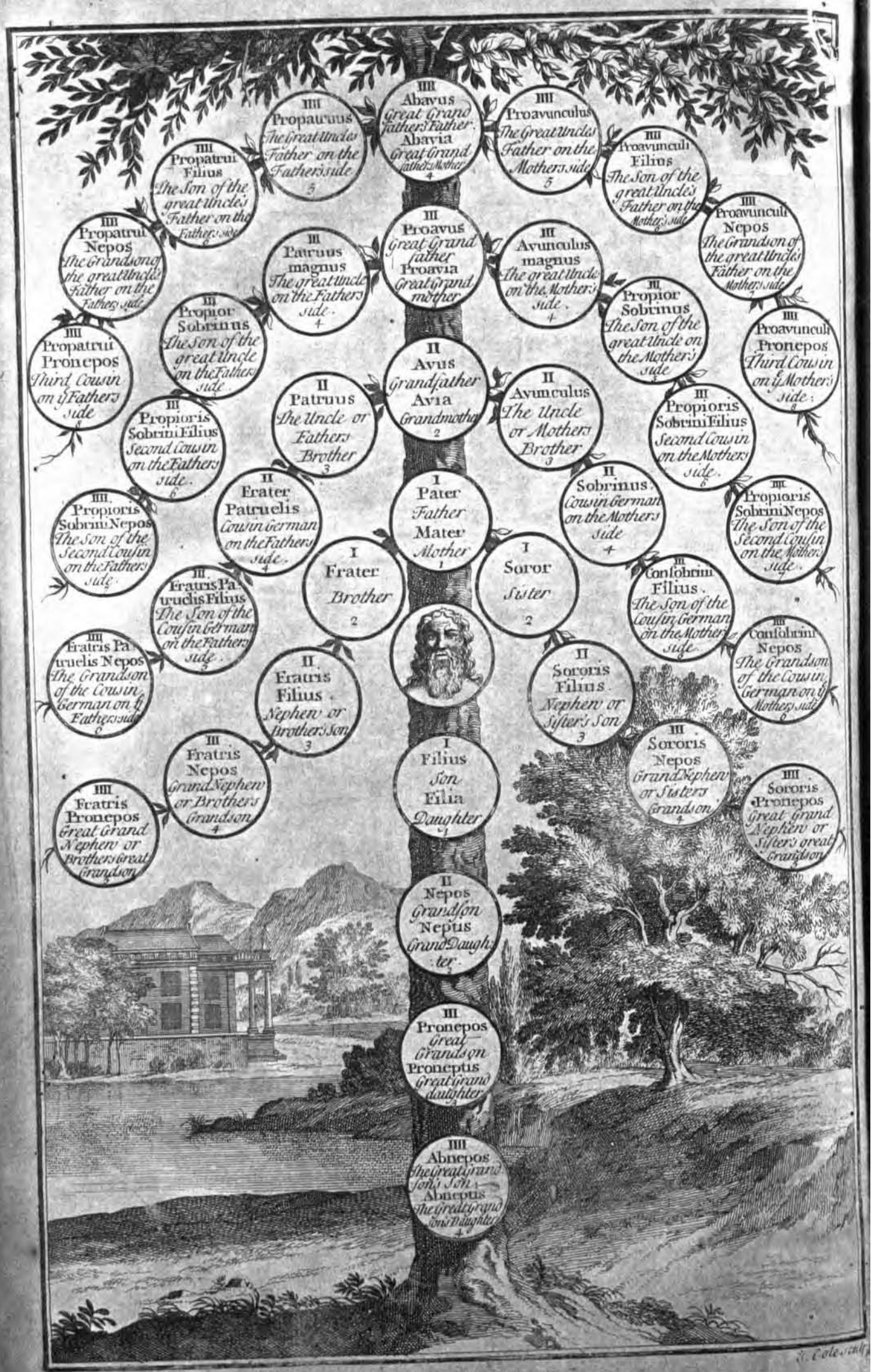


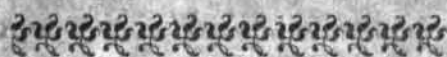
ADVERTISEMENT for the use of the FIGURE.

Since there may be occasion to count the Degrees of Consanguinity according to the manner in the Roman Law, or according to that of the Canon Law, the following Figure serves both for the one and the other. For in each place the Number of the Degrees is differently marked for the two, the number at the top marking the Degrees according to the Canon Law, and the number below according to the Roman Law.

As for the Lines, they are marked by the places of which they are composed. And it is easy to distinguish them all by the bare view of the Figure, where they are such as we have just now explained them.

TITLE





TITLE II.

In what manner FATHERS,
MOTHERS, and other
ASCENDANTS succeed.

THE Succession of Parents to Children is not according to the Order of Nature, as is the Succession of Children to Parents. But when it does happen, that Parents outlive their Children who die without Children, it is but just that they should not suffer the double loss both of their Children, and also of the Goods which they may leave behind them: And this sort of Succession of Ascendants, which in one sense is Not natural, is in another respect conformable to the Law of Nature, which calls them to the Succession as being the Next of Kin, and to Equity, which gives them this comfort under their loss.

It is perhaps because the Succession of Ascendants is not conformable to the Order of Nature, that it has been so differently regulated by divers Laws among the Romans, both with respect to Fathers, and also with respect to Mothers. As for Fathers, seeing they had the property of every thing which their Children who were not emancipated could acquire, excepting only the Peculiar Patrimonies of which we shall speak in the Preamble of the second Section of this Title, the Goods of the said Children whom their Fathers survived, did not pass to any Heir, but they remained to the Fathers who had a right to the said Peculiar Patrimonies, if their Children left no Children behind them, and died without disposing of them. And as for the Children who were emancipated, and who had acquir'd some Estate, their Fathers did not succeed to them by the ancient Law, unless that when they did emancipate them they had taken the precaution to secure to themselves the Right of succeeding to them, by observing a formality which had this effect; and without which they did not succeed to them^a.

^a §. ult. inst. de legir. agn. success.

to the Mothers, they had not in

the beginning any share in the Succession of their Children, whether they were emancipated or not, and likewise the Children did not succeed to their Mother. In process of time, Mothers did succeed, but differently, according to the different times, and the whimsical changes that many Laws made in their Right of Succession, by the distinctions of the cases where the Mothers succeeded in conjunction with the Father alone, or with the Father and Brothers of their deceased Children, or with the Father and the Brothers and Sisters, or with the Brothers and Sisters without the Father, or with the Brothers without Sisters, or with the Sisters without Brothers. Which made many different Combinations, and as many Rules which diversified the ways which Fathers and Mothers succeeded to the Children^b. But without entering into all this detail which would be of no manner of use, we shall confine our selves to the latest Laws, which have fixed all those changes, and which are in use in the Provinces where the Roman Law is received as their Custom.

^b L. 10. ff. de suis & legit. l. 2. §. 9. ff. ad Senat. Tertull. & Orphit. d. l. §. 18. Tit. inst. de Senat. Tertull. & tit. de Senat. Orphit. l. 2. C. ad Senat. Tert. l. 4. eod. l. 7. eod. d. l. §. 1. l. 9. C. de leg. hered. l. 14. eod. l. 15. eod. Nov. 22. c. 47. §. 2. Nov. 118. c. 2. Nov. 84. c. 1.

Here we may observe the inconvenience of the Succession of Ascendants, in making the Goods to pass from one Family to another; when a Mother, for instance, succeeding to her Son who had already inherited the Succession of his Father, transmits his Paternal Estate either to her Children by a second Husband, or to other persons. And it is the same thing with respect to the Father and other Ascendants who succeed to their Children.

It is against this inconvenience that provision has been made by that Rule of the Customs in France, which directs that Immoveables which come by Descent from their Ancestors shall not remount. Which has been explained in another place^c. And because the said Rule did not extend to the Provinces where the Roman Law takes place as Custom, it was there provided for by that Ordinance which is called the Edict of Mothers^d, which ordains that Mothers shall succeed only to the Moveables, and other Goods which their Children may have acquired otherwise than by the Father's side; and that they shall have

have only the Usefruct of the half of the Immoveables which came to their Children by descent from the Father's side. But that Edict is restrained to Mothers, and does not make the least alteration with respect to Fathers and other Ascendants.

^a See the Preface to this second Part, N^o 4. and the Remark on the sixth Article of this Section.

^b Of King Charles IX. an. 1567.

SECT. I.

Who are those that are called Ascendants, and in what manner they succeed.

The CONTENTS.

1. *Who are Ascendants.*
2. *Who are the Grand-fathers and Ancestors.*
3. *Ascendants of both Sexes.*
4. *In what manner the Father and Mother succeed.*
5. *The nearest Ascendants exclude the remote.*
6. *A kind of representation among the Ascendants.*
7. *The Brothers and Sisters of the whole blood succeed with the Ascendants.*
8. *When the Ascendants, Brothers and Nephews succeed together.*
9. *Ascendants have the right of Transmissio.*
10. *Ascendants of Bastards.*

I.

^{1. Who are the Ascendants.} **W**E use frequently the names of Parents and Ascendants, to signify indifferently all the persons from whom every one derives his birth. And in this sense the Father and Mother are of the number of Ascendants, and they are placed in the same Line^a. But because they are in the first degree, they are distinguished from the other Ascendants: and the name of Ascendants belongs more properly to Grand-fathers, and the other Ancestors above them.

^a Quidam parentem usque ad tritavum appellari aiunt: superiores, majores dici. Hoc veteres existimasse, Pomponius refert. Sed Caius Cassius omnes in infinitum parentes dicit: quod & honestius est, & merito obtinuit. l. 4. §. 2. ff. de in jus voc.

Altho' the French word Parent does often in the French Language take in the Collateral Relations; yet they often use it for the Ascendants, as when one speaks of the duty of Children towards their Parents.

II.

We call by the name of Grand-fathers, those who are in the degree immediately above the Father and Mother. Thus the name of Grand-father belongs to the Father's Father, and to the Mother's Father. And we call in general by the name of Fore-fathers, the Great Grand-father, and others above him^b. But this last name is never made use of in the singular number, when we speak only of one Ascendant.

^b Parentes usque ad tritavum apud Romanos proprio vocabulo nominantur. Ulteriores qui non habent speciale nomen majores appellantur. l. 10. §. 7. ff. de gradib. & affiu.

III.

The rank of Ancestors comprehends the two Sexes. And as to what concerns Successions, the Ancestors of both Sexes are called indifferently to those which may belong to them^c; as shall be explained in the Articles which follow.

^c Differentia nulla servanda inter personas istas, five feminae, five masculi fuerint, qui ad hereditatem vocantur. Et five per masculi, five per feminae personam copulantur: & five sua potestate, five sub potestate fuerit, is cui succedunt. Nov. 116. c. 2. in f.

IV.

The Father and Mother succeed equally to their Sons or Daughters who die without Children. And if both the one and the other survive, they divide the Inheritance between them: or which soever of the two survives alone succeeds to the whole Inheritance^d; saving the Goods which shall be spoken of in the following Section^e. But if the Son or Daughter to whom the Father or Mother, or both of them, are to succeed, had Brothers or Sisters of the whole Blood; these Brothers and Sisters would have their share in the Succession; as shall be shewn in the seventh Article^f.

^d Si igitur defunctus descendentes quidem non relinquat heredes, pater autem, aut mater, aut alii parentes ei superint, omnibus ex latere cognatis hos praeponi sancimus: exceptis solis fratribus ex utroque parente conjunctis defuncto. Nov. 118. c. 2.

^e As to what concerns the Mother, see what has been remarked in the Preamble to this Title.

^f See the fifteenth, sixteenth and seventeenth Articles of the following Section.

^g See the seventh Article of this Section, and the remark that is there made on it.

[The Law in England, as to the Succession of Intestates, is different from what is laid down in this Article. For the Father and Mother do not succeed jointly to the Estate of their Sons and Daughters who die Intestate, and without Wife or Children; but the Father succeeds

succeeds alone, and excludes the Brothers and Sisters, and all other Relations. And if after the death of a Father, any of his Children die Intestate without Wife or Children, in the life-time of the Mother, the Mother in that case succeeds jointly with the Brothers and Sisters of the deceased, and every Brother and Sister, and their Representatives, have an equal share with her. Stat. 22. & 23. Car. 2. cap. 10. 1 Jac. 2. cap. 17. §. 7.]

V.

5. The nearest Ascendants exclude the remotest.

If there are many Ascendants who survive their Common Descendant, they who are in the nearest degree will exclude those that are more remote. Thus the Father alone, or the Mother alone, or both together, exclude the Grand-fathers and Grand-mothers, and the Grand-fathers exclude the Great Grand-fathers. For there is no representation among Ascendants, as there is among Descendants.

* Si autem plurimi ascendentium vivunt, hos præponi jubemus qui proximi gradu reperiuntur, masculos & feminas, sive paterni, sive materni sint. Nov. 118. c. 2.

See the second and third Articles of the second Section of the foregoing Title.

The Rule explained in this Article is quite opposite to the Spirit of the Customs of France, which by the Rule, paterna paternis, materna maternis, of which mention has been made in other places, prefer the remotest Ascendants to those who are nearer, with respect to the Goods descended from their Stock. Which seems to be more equitable and more natural; and there seems even to be something of a hardship in the contrary Rule. See the remark on the following Article.

VI.

6. A kind of Representation among the Ascendants.

Altho' there be no Right of Representation among Ascendants, to make those who are at the greatest distance to concur in the Succession with the nearest; yet there is among them another kind of Representation which has another effect. That is when there are several Ascendants who concur in the same degree, some of them by the Father's side, and others by the Mother's side; for if this case should happen, the Succession of the Descendants would be divided into two Moieties, one of which would be given to the Ascendants by the Father's side, and the other to those of the Mother's side, altho' the number should be less on one side than on the other. The Paternal Ascendants being considered as taking the place of the Father, and the Maternal as succeeding in that of the Mother.

* Si autem eundem habeant gradum, ex æquo inter eos hæreditas dividatur. Ut medietatem quidem accipiant omnes à patre ascendentes, quantuncque fuerint: medietatem verò reliquam à matre ascendentes quantoscunque eos inveniri contigerit. Nov. 118. c. 2.

This Rule is not to be extended to any other of the Provinces in France, besides those which are governed

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by the Roman Law. For in the Provinces which are governed by their Customs, the Paternal Goods being appropriated to the Relations by the Father's side, and the Maternal Goods to those related by the Mother's side, the Ascendants on one side exclude those on the other from the Goods descended from their Stock; and they succeed to them notwithstanding that other Rule of the Customs, that the Immoveables which come by descent from Ancestors do not ascend; that is to say, do not go to the Ascendants. For the motive and use of this Rule, is only to hinder the Ascendants of one Stock from succeeding to the Estate descended from the other Stock, that the said Estate may not be transmitted from one Stock to the other.

VII.

The Father and Mother, and all the other Ascendants, exclude all the Collaterals from the Succession of their Children and other Descendants, except the Brothers and Sisters of the whole blood, who succeed by the head with the Father and Mother, or other Ascendants, to the Succession of their Brother, or Sister. So that if, for example, the Father and Mother, or one of them, or in default of them, other Ascendants survive one of their Sons, the Succession will be divided between them and their other Children, Brothers or Sisters of the whole blood to the deceased, by equal portions, and by the head, according to the number of persons which the Father, the Mother, or in default of them, the other Ascendants make together with their Children.

7. The Brothers and Sisters of the whole Blood succeed with the Ascendants.

* Si verò cum ascendentibus inveniantur fratres aut sorores ex utroque parentibus conjuncti defuncto, cum proximis gradu ascendentibus, vocabuntur, si & pater aut mater fuerint: dividenda inter eos quippe hæreditate secundum personarum numerum. Uti & ascendentium, & fratrum singuli æqualem habeant portionem. Nov. 118. c. 2. See the following Article.

It is to be remarked on this Rule touching the concurrence of Brothers and Sisters of the whole blood with the Father, or Mother, and the other Ascendants, that several Interpreters have been of opinion, that this concurrence took place only with respect to the Father and Mother; and that the other Ascendants ought to be excluded by the Brothers. And their opinion is grounded on these words of the Text, *Si & pater aut mater fuerint*; the meaning of which they took to be, that it is only the Father and Mother who can succeed jointly with the Brothers, and that consequently the other Ascendants do not concur in the Succession. But besides that the whole sequel of this text calls to the Succession together with the Brothers, the Ascendants in the nearest degree without any distinction, and

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and that the condition even of the remotest Ascendants is more favourable than that of the Brothers; we need only to remark that that which led those Interpreters into this opinion was the fault of the Translator of this Novel, who instead of these words in the Greek Original, *εἰ καὶ πατὴρ ἢ μητέρα ἀποζῶν*, which signify, *Et si pater aut mater fuerint*, that is to say, that altho' it were even the Father or Mother, has put it, *si & pater aut mater fuerint*, that is, provided it be the Father or Mother. Having taken for an equivocal expression, the word *εἰ*, *et si* for *si &c.* So that whereas it is in the Original, that the Brothers succeed jointly even with the Father and Mother who are the nearest Ascendants; they fancied, that it was only the Father and Mother who had right to succeed jointly with the Brothers, as if it were a favour granted to the Father and Mother, not to be excluded by the Brothers.

[By the Law of England, the Brothers and Sisters do not concur with the Father in the Succession of their deceased Brother and Sister, but the Father wholly excludes the Brothers and Sisters from the Succession, as has been already mentioned. For by the Act of Parliament for settling of Intestates Estates, the Rule is, that where there is neither Wife nor Children, the next of Kindred succeed unto the Intestate. If the person dying Intestate leaves behind him a Wife and Children, one third part of the deceased's Estate goes to the Wife, and all the Residue, by equal portions, to and amongst the Children, and such persons as legally represent them, in case any of the said Children be dead. If there be no Children, nor any legal Representatives of them, then the Moiety of the said Intestate's Estate is to be allotted to the Wife of the Intestate, and the Residue of the said Estate to be distributed equally to every of the next of Kindred of the Intestate; who are in equal degree, and those who legally represent them. In case there be no Wife, then all the said Estate is to be distributed equally to and amongst the Children. And in case there be no Child, then to the next of Kindred in equal degree; and their legal Representatives. Stat. 22. & 23. Car. 2. cap. 10.]

[According to this Act of distribution of Intestates Estates, the Mother who had survived the Father of the Intestate, being the next in degree of Kindred to the deceased, would have excluded the Brothers and Sisters of the Intestate, as the Father does now; if the Law had not received an alteration in that particular, by a subsequent Statute, which allots unto the Mother only an equal share with the Brothers and Sisters of the deceased, as has been already observed on the fourth Article of this Section. Stat. 1. Jac. 2. cap. 17. §. 7.]

VIII.

S When the Ascendants, Brothers and Nephews succeed together.

If in the case of the Brother or Sister of the whole blood, who should succeed to their Brother or Sister jointly with the Father, or Mother, or other Ascendants, as has been said in the foregoing Article, there should happen to be Children of a Brother of the whole blood that is deceased; the Children of the said Brother would succeed likewise

with the Ascendants, and with the Brothers and Sisters of the deceased, as would have among them the share which their Father, Brother to the deceased would have had if he had lived^m.

^m Sancimus ut si quis moriens relinquat ascendendum aliquem & fratres qui possint cum parentibus vocari, & alterius præmortui fratris filii. Et tantam accipiant portionem, quantum eorum futurus erat pater accipere, si vixisset. Hoc verò sancimus de illis filiis fratris, quorum pater ex utroque parente jungebatur defuncto. Et absolute dicimus, ordinem, quando cum solis vocantur fratribus, eundem eos habere jubemus & quando cum fratribus vocantur aliqui ascendendum ad hereditatem. Nov. 127. c. 1.

Altho' in this text there is mention made only of the Children of a Brother, and not of those of a Sister, yet there appears no reason to make any distinction between them. And it seems, that as the Rule explained in the preceding Article calls to the Succession the Sisters, as well as the Brothers, with the Ascendants; the Rule in this Article ought not to exclude the Children of Sisters, since they represent their Mothers, as well as the Children of the Brothers represent their Fathers.

But there arises from the Rule of this Article another difficulty, which proceeds from this, that the 127th Novel speaks only of the case where the Children of a Brother succeed jointly with their Uncle, Brother to the deceased, and with an Ascendant, and that it makes no mention of the case where there is no Brother to the deceased, but only some Ascendant, and the Children of a Brother that is deceased. Thus it might be called in question, whether in this last case the Children of the deceased Brother should succeed with an Ascendant, or if they should be excluded by the Ascendant, in the same manner as they would have been before this 127th Novel, which has established this new Right in their favour, contrary to the disposition of the 118th Novel, which called only the Brothers alone with the Ascendants. But since this 127th Novel which calls the Children of the Brothers to the Succession of their Uncle, together with his other Brothers and the Ascendants, has only made mention of the case where there are Brothers of the deceased, and says nothing of the case where there are no Brothers, the most learned Interpreters have been of opinion that this Law has left the case, of which it makes no mention, to be decided by the 118th Novel, which by not calling them to the Succession, excludes them from it. It would have

have been an easy matter for Justinian to have explained himself so as to have left no difficulty in this case. But perhaps this Law, as well as many others, has been made with a view to some particular case, rather than with a design to make a general Law for regulating all the cases which might be comprehended under it; and that for that reason the Law was restrained to the particular case which gave occasion for it. To which we must add, that if it were necessary to examine the question, whether when the deceased has no Brothers, but only Nephews with an Ascendant, the Nephews ought to succeed together with the Ascendant; it might be with some reason urged in favour of the Nephews, that the change which is the occasion that the deceased has left no Brothers behind him, ought not to make their condition less favourable, nor deprive them of the Right of Representation, which is granted to them when there are Brothers. But in reasoning upon what is determined in this case, by these two Novels, the 118th, and the 127th, it may be alledged against them, that on one side the Rules concerning the Interpretation of Laws direct, that the new Laws which derogate from the old ones be restrained to that which they expressly determine*; and that on the other side the Nephews have not the Right of Representation, except in the cases where these two Laws have given it them; and that by the ancient Law, when there were only Nephews of the deceased to succeed to him, they divided the Succession by the head, according to their number, without any Representation†.

* See the sixteenth and eighteenth Articles of the second Section of the Rules of Law.

† See the last Remark on the eighth Article of the second Section of the third Title of this Book.

IX.

9. *Ascendants have the Right of Transmissi-
on.* As Children and other Descendants succeed to their Fathers and Mothers, and other Ascendants, in such a manner that the Goods of the Inheritance are acquired to them before they do any Act as Heir, or even before they know the death of the Ascendant to whom they succeed; so Fathers and Mothers, and other Ascendants, have the same Right. And if having survived their Descendants to whom they succeed, they should happen to die before they had entered to the Succession, they would transmit it to their Heirsⁿ.

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* See the thirteenth Article of the second Section of the foregoing Title, and the Remark that is there made, as also the tenth Section of Testaments.

X.

As we do not reckon in the number of Children who succeed to their Fathers and Mothers, and other Ascendants, those who are not lawfully begotten; so we do not place among the persons who have right to succeed to their Descendants, the Fathers and Mothers, or other Ascendants of this sort of Children^o.

* See the eighth Article of the second Section of Heirs and Executors in general.

S E C T. II.

Of the Rights which some Ascendants may have, exclusive of the others in the Goods of the Children.

ALL that has been said touching the Succession of Ascendants, in the preceding Section, relates to the order in which they are ranked by the Laws which call them to the Successions of their Descendants, and how they succeed according to their ranks. And in this Section we shall explain some peculiar Rights which some Ascendants may have, exclusive of others, on the Goods of their Descendants.

For the better understanding this matter concerning the Rights of Parents in the Goods of their Children, and the Laws which relate thereto, it is necessary to remark, that by the ancient Roman Law, the Sons who were still in their Father's Family, that is to say, the Children who were not emancipated, but were still under their Father's Authority, could have nothing of their own. And all that could fall to them either by Succession, or Donation, or whatever they acquired by any other way, even by their own Industry, belonged to the Father; saving only that which the Son who was still under his Father's Authority might get either by his Service in the Army, or by his skill at the Bar^b. For what the Son who was in his Father's Family had acquired by any of these two ways, was intirely his own, his Father having no manner of right to it, not so much as the Usufruct of it; to which was afterwards

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added

added that which the Son should acquire in the exercise of any Publick Office or Dignity, or in any Employment that had a publick Salary annexed to it^c. It was this sort of Goods which they called by the name of *Peculium*, and which they distinguished into *Peculium castrense*, by which was meant all that they acquired in the War, and *Peculium quasi castrense*, which comprehended all that was got by those other ways. There was likewise another sort of *Peculium*, to wit, that which the Father gave out of his Estate to his Son who was still in his Family, whether it were in Money, or other things, that he might manage it apart, and improve it. But the profit of this *Peculium* belonged to the Father, as proceeding from his own Estate^d.

^c §. 1. *inst. per quas pers. cuiq. acquir.*

^d d. §. 1. l. 1. §. 15. ff. de collat. l. 1. §. 6. ff. ad Senat. Trebell. l. 3. §. 5. ff. de bon. poss.

^e L. ult. C. de inf. test. See the third Article of this Section.

^f *Idem* ff. de pecul.

As to the Children who were emancipated, whatever they could acquire was their own: and this was one of the effects of Emancipation, which was called for this reason, the benefit of being able to acquire Goods, *Beneficium bonorum querendorum*^e.

^e L. 1. ff. si à parent. quis manum. sit.

Afterwards the Emperors gave to the Children who were under their Father's Authority the propriety of the Goods which they had of their Mother, and of what they got in Marriage, or by some free Gift, and the Fathers retained the Usufruct of the said Goods^f. And at last *Justinian* ordered that all the Goods which the Children, even those who were not emancipated, should acquire, the same should be intirely their own, in whatever manner they acquired the said Goods, whether by their own Industry, or by Succession, or by some Liberality, or otherwise, but under two reserves; one was of the profit which the Son, who was still in his Father's Family, may have made of the Patrimony which his Father had intrusted to his care and management, the property of the said profit belonging still to the Father, as it did formerly according to the Ancient Law; and the other reserve was of the Usufruct which *Justinian* gave to the Father of all which the Children who were not emancipated should acquire, except those sorts of peculiar Patrimonies of which both the

Property and Usufruct belonged wholly to the Children by the ancient Law, in which he made no manner of alteration^g.

^g L. 1. C. de bon. mat. l. 1. C. de bon. qua lib. l. 5. cod.

^h L. 6. C. de bon. qua lib.

These different dispositions of the Roman Law with respect to the Right of Fathers in the Goods of their Children, belonged likewise to the Father's Father, who had kept his Grand-children still under his power, and he had the same Rights on their Goods; but here we have made mention only of the Father, and not of the Grand-father, for a reason which shall be explained in the Remark on the first Article of this Section.

Seeing the subject matter of this Section takes in the distinction of Children who are emancipated, and of those who are not, it is necessary to remark concerning Emancipation, that which has been said of it in the fifth and sixth Articles of the second Section of Persons, and to add thereto, that we see in the Customs of *France*, the distinction of Children who are emancipated, and of those who are not. But with remarkable differences, which distinguish the said Customs among themselves, and which distinguish them likewise from the Provinces which are governed by the Roman Law. These differences consist not only in what relates to the Rights of Parents in the Goods of their Children not emancipated, but also in the ways by which Children are held to be emancipated. Thus, as touching the Rights of Parents to the Goods of their Children not emancipated, there are some Customs which give the Usufruct, not only to the Father, but also to the Mother, and to the Survivor of them, of the Goods of their Children, until they come of Age. There are some Customs which retain still something of the ancient Roman Law, in that, by the said Customs, Donations made to Children who are not emancipated, belong to the Father, notwithstanding the change which *Justinian* made in the said ancient Law, as has been already taken notice of. Other Customs again give to the Father the Property of all the Moveables which the Son may chance to acquire before he accomplishes the age of five and twenty years. And other Customs dispose differently concerning the same thing. And in some of them it is even said, that the Paternal Authority does not take place there.

As to the ways by which Children are held to be emancipated, the most universal is that which is almost every where in use by Marriage, because the Husband becomes thereby the Head of his Wife and Family. Emancipation is likewise performed by an Act made in due form^h. There are some Customs where the Son is emancipated by his attaining the age of twenty years, others at the age of five and twenty, or if he has a Publick Officeⁱ, or if he carries on a Trade separately by himself, with the knowledge and approbation of his Father and Mother. There are again some Customs where the Son is held to be emancipated, if he lives in a distinct Habitation from his Father, which may be gathered from the twenty fifth Novel of the Emperor *Leon*. In some Customs Marriage does not emancipate the Children of Noblemen, unless the same be therein expressly mentioned; neither does it emancipate persons of an inferior Rank, until that after their Marriage they have lived a year and day out of the House, and separate from their Fathers. And there are likewise some Provinces which are governed by the *Roman Law*, where Marriage does not emancipate.

^h *V. l. ult. C. de emancip. lib.*

ⁱ *V. §. 4. inst. quib. mod. jus. pat. pot. solv. l. ult. C. de consul.*

We have made here these Remarks concerning the different dispositions of the *Roman Law*, and of the Customs of *France*, not only because of the relation they have to the subject matter of this Section, but to shew by this diversity of dispositions, without mentioning others of the *Roman Law*, which it would have been superfluous to explain here, that, as it has been remarked in other places, the matters which may be regulated by Arbitrary Laws, are subject to this multiplicity of Rules, not only in different places, but even in the same places, according to the times and the different views of those who have the right of making the Rules^l.

^l See the eleventh Chapter of the Treatise of Laws.

It remains only that we should acquaint the Reader, that among the many Rules relating to the subject matter of this Section, we have confined our selves to those which are both agreeable to the *Roman Law*, and most universally received. Which takes in all the Principles and Rules which are most essential in this matter.

THE CONTENTS.

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14. *It is the same thing with respect to the Grand-father by the Mother's side.*
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16. *The things given by the Ascendants revert to them.*
17. *The Father takes back the profits which have proceeded from his Goods.*
18. *The Change made by second Marriages.*

I.

OF all the Goods which the Children may acquire by their Labour or Industry, or which may come to them by any other Title whatsoever, whether they be emancipated, or not, whether they be Adult, or under the age of Puberty, whether they be Males or Females, the Father has no right in the Property of them, which belongs solely to the Children¹, saving only the Profit which may have arisen from the Goods

¹ *The Father has no Right in the Property of the Goods acquired by the Children.*

Goods of the Father, which he had put into the hands of his Son who was not emancipated. For the Propriety of the said profit would belong to the Father^b; but he has in the Goods acquired by his Son a right to the Usufruct of them, which shall be explained in the following Articles.

^a Si quis itaque filiusfamilias vel patris sui, vel avi, vel proavi in potestate constitutus, aliquid sibi acquisierit, non ex ejus substantia cujus in potestate sit, sed ab aliis quibuscumque causis, quæ ex liberalitate fortunæ, vel laboribus suis ad eum perveniant, eas suis parentibus non in plenum, sicut antea fuerat sancitum, sed usque ad usufructum solum acquirat. Ex eorum usufructus quidem apud patrem, vel avum, vel proavum, quorum in sacris sit constitutus, permaneat: dominium autem filiusfamilias inhæreat, ad exemplum tam maternarum, quam ex nuptialibus causis filiusfamilias acquiratarum rerum. Sic etenim & parenti nihil derogabitur, usufructum rerum possidenti: & filii non lugebunt quæ ex suis laboribus sibi possessa sunt, ad alios transferenda aspicientes, vel ad extraneos, vel ad fratres suos, quod etiam gravius multis esse videtur. l. 6. C. de bon. qua lib.

^b Si quid ex re patris obveniat, hoc secundum antiquam observationem totum parenti acquiratur. Quæ enim invidia est quod ex patris occasione profectum est, hoc ad eum revertitur. §. 1. inst. per quas pers. cuq. acquir.

In this Article we have made mention only of the Father, and not of the Grand-father, with respect to the Usufruct; and likewise in the following Articles there is mention made only of the Father; because that whereas by the Roman Law the Son who was married remained still in the power of his Father, and that thus the Grand-children, as well as their Fathers, remained likewise under the authority of their Grand-father, who had for that reason the Usufruct of their Goods; by the Usage in France the Son who marries being emancipated by the Marriage, except in some particular places, as has been observed in the Preamble to this Section, the Father has neither the Property nor the Usufruct of any thing that the married Son acquires. And the Usufruct of whatever the Children of this married Son may acquire belongs to their Father, and not to their Grand-father. But if it should so happen, that the Grand-father, or Father, had little or no Estate of their own, nor the Usufruct of any Goods belonging to their Children or Grand-children, they would have always a right to take what is necessary for their Maintenance out of the Estate belonging to their Children, as shall be shewn in the tenth Article.

II.

2. The Father has the Usufruct of the Goods of his Children who are not emancipated. The Father has the Usufruct during his Life of the Goods which his Children who are not emancipated may have acquired^c. Unless it be of the Goods that are excepted by the Rules which follow.

^c See the first of the Texts cited on the foregoing Article.

III.

3. The Father has not the Usufruct of the Son's peculiar Patrimony. The Father has not the Usufruct of what his Son who is not emancipated may have of that sort of peculiar Patrimony which is acquired either in the Army, or at the Bar, or in the exercise of some Dignity, of some Office, or of Publick Employment^d.

^d Exceptis castrensibus pecuniis, quorum nec usufructum patrem, vel avum, vel proavum habere veteres leges concedunt: in his enim nihil innovamus, sed vetera jura intacta servamus. Eadem observando etiam in his pecuniis, quæ, quasi castrensia pecunia, ad instar castrensis pecuniae accesserunt. l. 6. C. de bon. qua lib. V. l. ult. C. de inoff. test. & l. 101. C. de cast. om. palat. pecul.

If a Son who is still in his Father's power should carry on a Trade separately from that of his Father, and that with his Father's consent, would it not be just that the profit arising from the said Trade should belong wholly to the Son as it is regulated by some Customs, as has been observed in the Preamble? V. Nov. Leon. 25.

IV.

We must likewise except out of the Goods belonging to the Son that is not emancipated, of which the Father has a right to the Usufruct, that which the Son receives from the Prince's Bounty. For a Benefit of this kind supposes at least an equal merit, if not a greater, as the bare Service in the Army. And the Favours of the Prince do not admit of any diminution to the prejudice of those whom he is pleased to honour with them^e.

^e Cum multa privilegia imperialibus donationibus jam præstita sunt, dignum incrementum & his conferre nostra dignata est clementia. Si quis igitur à serenissimo principe, vel à piissima augusta, sive masculus, sive femina donationes sit consecutus, vel consecuta, sive mobilium, sive immobilium, sive se moventium rerum, filiusfamilias tamen constitutus, vel constituta, habeat hujusmodi res omni acquisitione absolutas, & nemini eas acquirat, neque earum usufructum pater, vel avus, vel proavus sibi vindicet. Sed ad similitudinem castrensis pecuniae omnem facultatem in eas filii vel filiaefamilias habeant; ut enim imperialis fortunæ omnes supereminet alias, ita oportet & principales liberalitates culmen habere præcipuum. l. 7. C. de bon. qua lib.

V.

The Goods given to the Son that is not emancipated, whether it be by any of his Ascendants, or by other persons, upon this condition, that the Father shall have no right to the Usufruct of them, are excepted from the Rule which gives the Usufruct to the Father; and this condition shall have its effect^f.

^f Sancimus igitur licentiam esse matri & avia aliisque parentibus, postquam reliquerint filii partem quæ lege debetur, quod reliquum est suæ substantiæ, sive in solidum voluerint, sive in partem filio vel filia; nepoti vel nepti, & deinceps descendentibus donare, aut etiam per ultimam relinquere voluntatem, sub hac definitione atque conditione, si voluerint, ut pater, aut qui omnino eos habent in potestate, in his rebus neque usufructum, neque quolibet penitus habeant participium. Hæc enim & extraneis relinquere poterant, unde nulla parentibus utilitas nasceretur. Hoc itaque non solum parentibus, sed etiam omni personæ licere præcipimus. Nov. 117. c. 1.

There are some Customs which make the same exception to the Usufruct of the Father which is explained in this Article.

VI. In

VI.

The Father succeeding to his Son together with the Brothers, has not the Usufruct of their Portions.

In the case where the Father surviving one of his Children who left behind him Brothers of the whole Blood, succeeds to him together with the Brothers, as has been said in the seventh Article of the first Section, seeing he has the Property of one Portion of the Goods of his deceased Child, he has not the Usufruct of the Portions belonging to his other Children, Brothers of the deceased &.

* Ascendentium & fratrum singuli aequalem habeant portionem. Nullum usum ex filiorum, aut filiarum portione, in hoc casu, valente patre sibi penitus vindicare. Quoniam pro hac usus portione, hereditatis jus secundum proprietatem per praesentem dedimus legem. Nov. 118. c. 2.

VII.

7. The Father's duty in relation to the Goods of which he has the Usufruct.

The Father who has the Usufruct of the Goods of his Children, is bound to take care of every thing that belongs to the said Goods, to preserve the Rights, to get in the Debts, to prosecute and defend the Law-Suits, to lay out the necessary Expences, and in general to do every thing that a faithful Administration requires^b.

^b Parentes autem penes quos maternarum rerum utendi, fruendi; tantum potestas est, omnem debent tuendæ rei diligentiam adhibere. Et quod jure filiis debetur, in examine per se, vel per procuratorem poscere: & sumptum ex fructibus impigre facere: & litem inferentibus resistere. Atque ita omnia agere, tanquam solidum perfectumque dominium eis acquisitum fuisset. l. 1. C. de bon. mat. See in the Title of Usufruct the Rules which may agree to the Usufruct of Fathers.

VIII.

8. The Father has the Property of all the advantage that he makes by the Usufruct.

If the Father having reaped some advantage from the said Usufruct, makes any purchase therewith, or encreases otherwise his Estate thereby, he may dispose of the income thereof as he pleases; and whatever part thereof shall be found to remain in his Succession, the same shall be common to all his Children; and the Child from whose Goods he has reaped this profit, shall have no greater share thereof than the others. For it was a Right which the Father had acquired, and which belonged to him in the same manner as his other Goods^c.

^c Et si quid ex usu earum (rerum) pater avus vel proavus collegerit, habet licentiam quemadmodum cupit hoc disponere, & in alios heredes transmittere. Vel si ex earum rerum fructibus res mobiles, vel immobiles, vel se moventes comparaverit, eas etiam quomodo voluerit habeat, & transmittat, & in alios transferat, sive extraneos, sive liberos suos, sive quamlibet personam. l. 6. §. 2. C. de bon. qua. lib.

IX.

But if on the contrary the Father who had the Usufruct of the Goods of one of his Children, lets the Child himself reap the profits, the other Children cannot after the Father's death claim any thing on account of the said Usufruct, nor of the advantage that has been made by it. For it was free for the Father to abstain from the Usufruct, and to let the Child to whom the Goods belonged enjoy the profits thereof^d.

^d Sin autem res sibi memorato modo acquisitas parens noluerit retinere: sed apud filium aut filiam vel deinceps personas reliquerit, nullam post obitum ejus licentiam habeant heredes alii patris, vel avi, vel proavi, eundem usufructum, vel quod ex hoc ad filiosfamilias pervenit utpote (patri debitum) sibi vindicare. Sed quasi diuturna donatione in filium celebranda, qui usufructum detinuit, quem patrem ejus habere oportuerat, ita causa intelligatur, ut eundem usufructum post obitum patris ipse lucratur, parente jus exactionis quasi sibi debita à filio qui usufructum consensu ejus possidebat, suæ posteritati, vel successioni minime transmittente. Quatenus in omni pace inter se ejus successio permaneat, nec altercationis cujusdam (maximè inter fratres) oriatur occasio. l. 6. §. 2. C. de bon. qua. lib.

X.

Whether the Father have some Usufruct of the Goods of his Children, but which is not sufficient for his Maintenance, or whether he has none at all, he ought to have out of the Goods of his Children, whether they be emancipated or not emancipated, that which may be necessary for his Food, for his Maintenance, for his necessities during any sickness, and other such like wants, according to his quality, and the value of the Goods. And the Mother, and all the Ascendants both by the Father and Mother's side, who happen to be in the like want, have the same right^e.

^e Parentum necessitatibus liberos succurrere justum est. l. 1. C. de alim. lib. ac parent.

Competens iudex à filio te ali jubeat, si in ea facultate est, ut tibi alimenta præstare possit. l. 2. eod.

Utrum autem tantum patrem, avumve paternum, proavumve paterni avi patrem, ceterosque virilis sexus parentes alere cogamur, an verò etiam matrem, ceterosque parentes, & per illum sexum contingentes cogamur alere, videndum. Et magis est ut utrobique se iudex interponat, quorumdam necessitatibus facilius succursurus, quorumdam ægri-tudini, & cum ex æquitate hæc res descendat caritateque sanguinis, singulorum desideria pendere iudicem oportet. Idem in liberis quoque exhibendis à parentibus dicendum est. Ergo & matrem cogemus præsertim vulgò quæsitos liberos alere, nec non ipsos eam. l. 5. §. 2. 3. & 4. ff. de agnos. & al. lib. Alimenta autem pro modo facultatum erunt præbenda egentibus. d. l. §. 19. Filia tua non solum reverentiam, sed etiam subsidium vitæ ut exhibeat tibi, rectoris provincie auctoritate compeletur. l. 5. C. de patr. pot.

10. Parents have their Alimony, and other necessities out of their Childrens Estate.

It is to be remarked on this Article, that the Fathers and Mothers of Bastards have the same Right. And although the Text quoted on this subject speaks only of the Mother, yet it is the same Equity, with regard to the Father, when he is known. And this duty is likewise reciprocal on the part of the Parents towards the Children of this kind.

See the remark on the eighth Article of the second Section of the first Title of the first Book.

XI.

11. Parents are bound to nourish and maintain their Children.

As Children are obliged to nourish and maintain their Parents, so Parents on their part are bound to take the same care of their Children, not only because of the Usufruct which they may have of their Goods, but by the Right of Blood, and according as the Estate of the Parents may be sufficient for that purpose, unless it be that the Children render themselves unworthy thereof. And in general it is a reciprocal duty between Ascendants and Descendants, that such of them as are able ought to maintain those who are in want.

* Idem in liberis quoque exhibendis à parentibus dicendum est. l. 5. §. 3. ff. de agn. & al. lib.

Si patrem tuum officio debito promerueris, paternam pietatem tibi non denegabit. Quod si sponte non fecerit, aditus competens iudex alimenta pro modo facultatum præstari tibi jubebit. l. ult. C. de alen. lib. ac parent.

Ipsam autem filium, vel filiam, filios vel filias, & deinceps alere patri necesse est: non propter hereditatem, sed propter ipsam naturam, & leges quæ à parentibus alendos esse liberos imperaverunt: & ab ipsis liberis parentes, si inopia ex utraque parte vertitur. l. ult. §. 5. de bon. qua lib. Non tantum alimenta, verum etiam cætera quoque onera liberorum patrem ab iudice cogi præbere, rescriptis continetur. l. 5. §. 12. ff. de agnosc. & alen. lib. Quod de alendis matre & filiis indigentibus definivimus, hoc quoque in omnibus ascendentibus descendentibusque personis utriusque naturæ, valere præcipimus. Nov. 117. c. 7. in f.

XII.

12. Parents and Children are not bound for one another's Debt.

We must not reckon among the necessities which Parents have a right to have supplied out of their Children's Goods, the Debts which they owe. For the duty of Children towards their Parents is limited to what may regard their Persons. And it is the same thing as to the Debts of the Children with respect to their Parents. But if a Father, or other Ascendant were in Prison for Debt, and his Son had the means of delivering him out of Prison, by obliging himself to produce him when required, or to pay the Debt if he was able, if the Son should fail in this duty towards his Father, his ingratitude would deserve that he should be disinherited according to the circumstances.

* Parens quamvis ali à filio ratione naturali debeat, tamen res alienum ejus non esse cogendum

exolvere filium, rescriptum est. l. 5. §. 16. ff. de agnosc. & al. lib. Neque ex ejus filii persona qui cum sui juris esset, mutuum pecuniam accepit, pater ejus, si non fidem suam obstrinxit, conveniri potest: neque ex ejus quem in potestate habet: si sine jussu ejus contractum est. l. 1. C. fil. pro patr. vel pat. pro fil.

See concerning what is said of Disinheriting, the third Article of the second Section of undutiful Testaments.

XIII.

This duty of nourishing and maintaining the Children belongs principally to the Father, and the Mother is not bound to it, except where the Father's Estate is not sufficient. Thus the Mother, who in case of the neglect or refusal of the Father, or in case of his absence, has been obliged to supply her Child with those necessities out of her own Estate, may recover it out of the Father's Estate, unless it shall appear that she has only given such things as she might have given out of a Motherly Affection, even although the Father had maintained the Child out of his own Estate.

13. The Mother is not bound to maintain the Children, but in default of the Father.

* Si mater alimenta quæ fecit in filium à patre repetat, cum modo eam audiendam ita divus Marcus rescriptit Antonia Montana, in hæc verba. Sed & quantum tibi alimentorum nomine, quibus necessario filiam tuam exhibuisti, à patre ejus præstari oporteat, iudices æstimabunt. Nec impetrare debes ea quæ exigente materno affectu in filiam tuam erogatura esses, etiam si à patre suo educeretur. l. 5. §. 14. ff. de agn. & al. lib.

XIV.

The Children of Daughters cannot claim their maintenance out of the Estate of their Grand-father by the Mother's side, except in the case where the Father or Grand-father by the Father's side are not able to maintain them. For the Children of the married Daughter are under the power of their Father, and out of the Family of their Grand-father by the Mother's side.

14. It is the same thing with respect to the Grand-father by the Mother's side.

* Non quemadmodum masculorum liberorum nostrorum liberi ad nostrum onus pertinent, ita & in foeminis est. Nam manifestum est, id quod filia parit, non avo, sed patri esse suo oneri: nisi pater aut non sit superstes, aut egens est. l. 8. ff. de agn. & al. lib.

XV.

All the foregoing Rules respect the Rights which Parents have in the Goods of their Children during their Children's Life. And as to the Goods which they leave behind them at their death, if they die without Children, their nearest Ascendants who survive them succeed to them, as has been explained in the preceding Section, unless it

15. Two sorts of Rights which Ascendants have in the Goods of their Children.

it be in such Goods as are excepted by the following Rules^r.

^r See the places quoted in the Article.

and which we shall speak of in its proper place^u.

^u See the fourth Title of the third Book.

XVI.

16. The things given by the Ascendants revert to them.

If in the Inheritance of a Person who dies without Issue, and who leaves behind him a Father and Mother, or other Ascendants, there should happen to be some Goods which had been given to the said person by one of the Ascendants who survive him; he who gave the said Goods may take them back again, by virtue of the Right which is called Reversion, and he will exclude from them all the other Ascendants, even the nearest, who would exclude him from the rest of the Goods^f.

^f See the following Section, where the Right of Reversion is explained.

XVII.

17. The Father takes back the profits which have proceeded from his Goods.

It is necessary likewise to remark, as an Exception to the Rule which calls jointly to the Succession all the Ascendants in the same degree, that if a Son who was not emancipated, whom his Father had intrusted with the management of some small Patrimony, had made any profit by it; his Father and his Mother happening to survive him, whatever profit had been made of the said Patrimony which the Father had intrusted the Son with, would belong to the Father, he having as it were already a Right to it before the Son's death, as has been explained in the first Article; and the Mother, would only have a share in the other Goods which the Son had acquired some other way. And it would be the same thing in the cases where the Brothers of the whole Blood should likewise succeed, whether it were with the Father alone, or with the Father and Mother^t.

^t Si quid ex re patris ei obveniat, hoc secundum antiquam observationem, totum parenti acquiratur. §. 1. *inst. per quas pers. cuiq. acquir.*

See the Law quoted on the first Article, in which there are these words, *Non ex ejus substantia cujus in potestate sit.*

XVIII.

18. The change made by second Marriages.

We must in the last place take notice of one other cause which occasions some change in the Rights of Fathers, Mothers, and other Ascendants, to the Goods of their Children; which is the case where the Father, Mother, or other Ascendant who has Children, happens to marry again, which is a matter that is necessarily to be distinguished,

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SECT. III.

Of the Right of Reversion.

WE have already spoken of the Right of Reversion in the sixteenth Article of the foregoing Section, where it was necessary to make mention of it, as being one of the Rights which the Ascendants have in the Goods of the Descendants; but we spoke of it there only in general and for Order's sake. And seeing this matter has some Rules which are peculiar to it, they shall be explained in this Section.

The Right of Reversion, which gives back again to the Ascendants the things which they had given to their Descendants who die before them without leaving behind them any Children, is so natural, that it has been equally received both in the ancient and modern Roman Law: And it is likewise received in France, both in the Provinces which are governed by their Customs, and in those which follow the Roman Law. We see in the Laws two motives of Equity, which make this Right of Reversion to be just and favourable. One is, to give to the Ascendants this comfort, of not suffering at the same time the double loss of their Children, and of the Goods which they had stript themselves of in their favour^a. And the other motive, which is a consequence of the former, is not to discourage Ascendants from exercising their Liberality towards their Descendants, as it might happen if they should have any reason to fear this double loss^b. But altho' these motives of the Right of Reversion regard equally the Father and Mother, and all the Ascendants by the Father and Mother's side; yet the Reversion was limited in the Roman Law to the Father, and to the Ascendants by the Father's side, who had in their Power the Children to whom they had given any thing; and the Mother, with the Ascendants on her side, had not this Right unless they had stipulated it^c. And some Interpreters have been of opinion, that *Justinian* had entirely abolished this Right, and that the Father and Grandfather by the Father's side were excluded from it by his 118th Novel, because

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that by the said Law he calls equally the Ascendants to the Successions of the Descendants, according to the order of their Proximity, without reserving to them this Right of Reversion; from whence they have concluded, that if, for example, a Grand-father by the Father's side had made a Gift to his Grand-son, who should happen to die, leaving behind him his Mother and this Grand-father, the Mother would exclude the Grand-father from having that which he had given to his Grand-son.

^a Jure succursum est patri, ut filia amissa, solatii loco cederet, si redderetur ei dos ab ipso profecta, ne & filia amissa, & pecunie damnum sentiret. l. 6. ff. de jure dot. l. 4. C. solut. matr.

^b Prospiciendum est enim, ne hac injecta formidine, parentum circa liberos munificentia retardetur. l. 2. C. de bon. qua lib.

^c See the Texts cited on the second Article, and the Remark that is there made upon it. V. Nov. Leon. 25.

This interpretation, which is so widely different from the Spirit of the said Law, has not been received in France, and it may be said, that the words of this Novel of Justinian cannot have this effect. For this Right of Reversion, which is so expressly established by several Laws, and so equitable that it is as it were a part of the Law of Nature, could never be abolished by a Law that makes no mention of it. And we should have reason to exclaim against the hardship of a Law, which should ordain in the case which we have just now mentioned, that the Mother should exclude the Grand-father from the Right of Reversion. Thus Justinian not having expressly abolished this Right by the said Novel, it ought to subsist according to that Rule concerning the Interpretation of Laws, which directs us to reconcile the ancient Laws with the new, by interpreting the one by the other, and giving to them all the just effect which their intention demands, in every thing where they are not contrary to one another, and in that which the latter Laws have not abrogated^d. But if this Rule comprehends likewise the Arbitrary Laws, it ought with much more reason to be understood of the Laws that are founded on Natural Equity, and especially those which, as this Law touching the Right of Reversion to Ascendants, have for their Principles Truths which cannot be called in question without a kind of inhumanity.

^d See the eighteenth Article of the second Section of the Rules of Law.

If therefore we examine this 118th Novel according to this Rule, we shall find nothing in it that may give us any reason to think that Justinian had a design to abolish the Right of Reversion. And it may likewise be added, that the natural effect of the Right of Reversion, is to make the Goods that are subject to it, not to be considered as a part of the Succession of the person to whom they had been given, but to be excepted and separated from the Succession, in order to be returned to the Ascendant who has this Right. For the Gifts of Ascendants to their Descendants imply this tacit condition, that if it happens that the Donor survives the Donee who dies without Children, he shall take back again that thing which he stripped himself of only with the view of transmitting it to his Descendants. Thus this thing, with respect to the Ascendant who gave it, may be considered as not being a part of the Inheritance of the Donee, and by consequence not subject to the Laws which regulate Successions.

THE CONTENTS.

1. Definition of Reversion.
2. Two sorts of Reversion, either by the Law, or by Agreement.
3. The Reversion by Agreement is regulated by the Agreement.
4. Reversion of things given in favour of Marriage.
5. This Right does not hinder the profits which do arise out of the Goods subject to the Reversion.
6. The Father has the Reversion of the Dowry given by the Grandfather on the Father's side.

I.

BY the Right of Reversion is meant, the Right which a Donor who survives his Donee has to take back the things which he had given him, as shall be explained by the following Rules^a.

^a Quod dedit iterum ad eum revertatur. l. ult. C. comm. utr. jud.

II.

We ought to distinguish two sorts of the Right of Reversion. That which the Law gives to Fathers and other Ascendants, altho' there be no Agreement about it: and that which has been stipulated by an express Agreement, whether it be by an Ascendant, or any other Donor, even a Stranger^b, that is to say, one to whom the Donee is no ways related.

^b Si quis pro filio suo ante nuptias donationem conscripserit, vel dederit, vel pro filia sua dotem; &c. hoc quod dedit, iterum ad eum revertatur, vel stipulatione, vel lege hoc faciente, &c. l. ult. C. com. urr. jud. Si non specialiter extraneus dotem dando, in suam personam dotem stipulatus sit, vel pactum fecerit &c. l. un. §. 23. C. de rei ux. act. Extraneum autem intelligimus omnem citra parentem per virilem sexum ascendentem, & in potestate datam personam non habentem. d. §. in f. V. tit. Ulp. 6. §. 5. V. Nov. Leon. 25.

Altho' the Reversion which is mentioned in these last Texts was of a larger extent than that which is spoken of here; and that it had this effect, that the Dowry was restored to the Donor not only in the case where the Daughter that was endowed died, but even in her lifetime in case of a Divorce; yet we have added these two Texts, in order to observe therein two things. One is, that when a Stranger gave a Portion with a Woman in Marriage, he had not this Right of Reversion, unless he had stipulated it: and the other is, that they reckoned in the number of Strangers, even the Mother, and the Ascendants by the Mother's side, because they had not the Daughter in their power. See touching this Remark that which is made on the fourth Article.

III.

3. The Reversion by Agreement hath its effect, such as it is settled by the Agreement, whether it be between Ascendants and Descendants, or other persons^c.

^c The Agreement about the Reversion having nothing unlawful in it, it hath its effect according to the Rules of Covenants.

See the Texts cited on the foregoing Article, and the eleventh Article of the second Section of Dowries.

See the close of the Remark on the fifth Article.

IV.

4. Reversion of things given in favour of Marriage. If a Father, a Mother, or other Ascendant having endowed a Daughter, or made some present to one of his Children, or Descendants, in favour of their Marriage, survives the Donee, who dies without Issue, he shall take back the things which he gave. And although the Reversion of the said things has not been expressly stipulated, yet the Donor shall have them before any other Heir, and even preferably to the nearest Ascendant, who perhaps may exclude him from the Inheritance of the said Donee^d.

^d Jure succursum est patri, ut filia amissa, solatii loco cederet, si redderetur ei dos ab ipso profecta: ne & filiae amissa, & pecunie damnum sentiret. l. 6. ff. de jure dot.

Dos à patre profecta si in matrimonio decesserit mulier filia familias ad patrem redire debet. l. 4. C. sol. matrim. l. 17. in f. ff. de Senat. Maced.

Constitutionis novæ capitulum clariore interpretatione sancimus, ut quæ per filios nepotes, proneptes, itemq; filias, neptes, proneptes, quamvis in potestate sint minimè acquiri patri decrevimus, à marito vel uxore, quocunque titulo collata, five ultima transmissa voluntate, nullus ad id quoque pertinere existimet, quod ab ipso parente datum, vel dotis, vel ante nuptias donationis causâ, pro una ex memoratis personis præstitum fuerat: ut minimè ad eum si casus tulerit revertatur. Prospiciendum est enim ne hac injecta formidine paren-

tum circa liberos munificentia retardetur. l. 1. C. de bon. qua lib.

See the sixth, seventh and eighth Articles of the second Section of the Title of Dowries.

Although the Texts cited on this Article, and those which have been quoted on the first and second Articles, do not extend to the Mother, and the other Ascendants by the Mother's side, yet we have nevertheless comprehended in the Article all the Ascendants without distinction. For according to the Usage in France, they have all of them this Right of Reversion, and the same Equity makes the Reversion to be as just on their part, as on the part of the Father. There are even some Customs in France, which extend the Right of Reversion, not only to the Mother, and the Ascendants on the Mother's side; but even to Collateral Relations, even altho' there be no Agreement for so doing. And this Right is likewise given to Collaterals in some places in France which are governed by the Roman Law; but in other places they have it not, except where it is expressly stipulated.

We must remark on this Article, that although these dispositions of the Roman Law regard only Dowries and Donations made in favour of Marriage; yet seeing the Right of Reversion is no less just in the other sorts of Donations, the greatest part of the Customs in France have extended it to all Donations in general by express Dispositions. And it is the common Usage in France, both in the Customs which have made no express provision therein, and likewise in the Provinces which follow the Roman Law, that the Reversion in favour of Ascendants takes place in all sorts of Donations, altho' there be no express stipulation to that purpose.

We must likewise farther observe in relation to the same dispositions of the Roman Law, that they do not distinguish the case where the Descendant, who is the Donee by his Contract of Marriage, dies without issue, from that when he leaves Children behind him. Which gave rise to a question, which Usage has decided between two Parties, one of which pretended that altho' the Descendant who was the Donee left Children behind him, yet the Reversion took place; the other alledging that the Reversion was not to take place but in the case where the Donee died without Issue. It is this second opinion that has been established as the Rule: and it is so just and so natural, that it may

be said, that it is not only the Plurality of Voices, but that it is also Reason which has established it as a Rule; since Donations in favour of Marriage, and the Dowries of Daughters have the same end as Marriage, and respect not only the Donees, but likewise their Descendants. From whence it follows, that when there are Children who survive their Fathers or Mothers, to whom the Donation had been made in favour of Marriage, the motive of the Donation subsists in their persons; and they make the motive of the Reversion to cease, which is to prevent the Donor's falling at the same time into the double loss both of his Goods and of his Child, as has been observed in the Preamble of this Section. For if the Donee leaves Children behind him, the Ascendant who was the Donor and who survives him, considers in those Children the person whom they represent, and he sees the Goods which he had bestowed pass to the use which engaged him to give them away.

** It may be observed touching these opinions, that both the one and the other have some foundation in the Roman Law. V. l. 12. ff. de pact. dotal. Ulp. Tit. 6. §. 4.*

Seeing the consideration of the Children of the Donee makes the Reversion to cease when the Children survive him, a question has been started, whether in this case the Right ceases in such a manner, that if the said Children should happen to die before the Ascendant who was the Donor, whether he would be deprived of the Right of Reversion. But because the said Children are considered themselves as Donees of their Grand-father, as we have just now observed; it would seem that it might be urged, that the Donation being continued in their persons, the Right of Reversion was only suspended in their favour, and that it begins to have its effect whenever the Donation ceases to have its effect by their death. For in that case this Donor who survives both the Donee and the Donee's Children, is in the same condition as if he had survived the Donee dying without Issue. Since by his surviving all this branch of his Descendants on whose account the Donation was made, he survives in effect his Donees, and comes within the motive of the Laws which grant the Right of Reversion.

Altho' the Donation were not made in favour of Marriage, yet it seems that it would be fully as equitable that the

Children of the Donee should make the Reversion to cease in that case; and that on the contrary it should take place if the Donor did survive the Donee and his Children. For every Donation from an Ascendant to a Descendant has a view to the settlement of the Person and Family of the Donee; and the motives of the Rules of Reversion which we have just now explained, seem to be common to all sorts of Donations in favour of Children.

V.

In the case of the preceding Article, *5. This* the profits which the Wife of the Donee has a right to out of the Donation made to her Husband by his Father or other Ascendant, in favour of their Marriage; and the profits which the Husband has a right to in the same manner out of his Wife's Marriage Portion, would have their effect: and the Reversion would be diminished by those kinds of profits, whether they were regulated by the Contract it self, or by Custom, or some other Law. For this Donation and this Dowry being in favour of the Marriage, they ought to follow the conditions thereof, which are such, that whatsoever is given to the Wife is subject to the Rights of the Husband; and whatsoever is given to the Husband, is likewise subject to the Rights of the Wife, unless it has been otherwise agreed on^e.

** Si pater dotem dederit, & pactus sit, ut mortua in matrimonio filia, dos apud virum remaneat: puto pactum servandum, etiam si liberi non interveniant. l. 12. ff. de pact. dot.*

Altho' there should be no Covenant to regulate these profits, as there was in the case of this Text, yet if they are regulated by Custom, it is equally just that they should diminish the Reversion. For the Donor knew sufficiently this consequence of his Donation, and that the Goods which he gave would be subject to these sorts of profits. Which regards as well the profits that the Wife has a Right to out of the things given to her Husband, as the profits which the Husband has a Right to out of his Wife's Marriage Portion. And since the Text cited on this Article takes in the whole Dowry according to the agreement that had been made, with much more reason may it be applied to the profits which consume only a part of it.

If besides the profits that belong to the Wife, out of the things given to her

her Husband, she had likewise her Dowry to recover, and the other Goods of the Husband were not sufficient to answer the same; would the Reversion, of which the case had happened, the Husband being dead without Children hinder the Wife from recovering her Dowry out of the things given to the Husband? Seeing this Restitution of the Dowry is a consequence of the Contract of Marriage, the things which are given to the Husband ought to be comprehended among the Goods of the Husband which are responsible for the Dowry; and this is a charge which the Donor could not be ignorant of, since the Dowry was promised only on the assurance that all the Goods belonging to the Husband should be answerable for it; which included particularly the things given on account of the Marriage, unless they had been excepted by an express clause^a.

^a See the seventeenth Article of the first Section of Substitutions direct and fiduciary.

But if the Donee had contracted Debts, could his Creditors hinder the effect of the Reversion? Or could the Donor alledge against the Creditors, that the Goods which he had given are appropriated to him in the case of the Reversion, and that the Donee could not mortgage them to his prejudice, no more than an Heir who is charged with a Substitution can engage the Goods which are subject to the Substitution? And would it likewise be said that this Donee could not alienate the Goods subject to the Reversion, nor dispose of them by Testament?

As to the Alienation and Mortgage of the Goods which are given, we must consider what are the motives of the Donations made by Ascendants to their Descendants, and judge by those motives of the use that the Donee may make of the things given him, what right he has to them, and what right the Donor has still in them. The intention of the Ascendants who make Presents to their Descendants, is always without doubt that the Goods which are given may serve towards the settlement of the Donee, and to all the uses that shall be consequences of the said settlement, which implies all the uses that any Master of a Family may make of the Goods for his Person and for his Family. Thus this Donee has over those Goods which are given him, the right to make use of them according as his affairs shall require; which supposes

the liberty of using them in the same manner as any Proprietor may use the Goods that are his own. And the Donor has on his part his Right of Reversion in the said Goods, if the case does happen.

If we put in the scales this Right of the Donor, and that of the Donee, in order to give to the one and to the other their just effect, we see that the Donee being Master of the things given him, and given towards his Settlement, it is a consequence of such a Donation, that he may use them according as his affairs shall oblige him, and as the said settlement and all its consequences may demand. Which implies the necessity of using them so as to mortgage and alienate them. For if, for example, this Donee is a person that has occasion to purchase an Office, it will become just and necessary that the Creditors who shall lend him Money upon a Mortgage of the Goods given, or those to whom he shall sell them in order to lay out the price in the Purchase of the said Office, should have nothing to fear on the score of the Right of Reversion, since their security upon the Office might fail them in case it be suppressed, or fall in its value. From whence it follows, that a Donee may for any other affair mortgage the Goods which are given him, as well as the rest of his Goods; and that what he may do for one affair, he may do for all others, since the Right of Reversion does not put the Donee under Tutorship, and does not oblige him to examine so nicely, whether he employs to advantage the Goods which the Donation has made him master of; and that the Creditors of the said Donee are not bound on their part to take any other precautions than those which are usually taken with all Debtors who possess only free Goods, which they may dispose of as being absolutely Masters of them, since the Reversion ought not to be compared to a Substitution which leaves no liberty to the Possessor to dispose of the Goods to the prejudice of the person who is substituted to them; otherwise it would be necessary that a Contract of Marriage in which a Father endows his Daughter, should be made public as a Substitution, in order to preserve to him his Right of Reversion. And it is so just and so natural that the Reversion should cease with respect to the Creditors of the Donee, that some Customs in *France* which ordain that the Goods given by Ascendants should return to them without

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the burthen of the Debts of the Donee, do add that the Goods given are nevertheless subject by way of Supplement to the Debts of the Donee, in case his other Goods should not be sufficient to discharge them.

Lastly it may be said, that the nature and proper character of the Right of Reversion is to distinguish in the Mass of the Goods belonging to the Succession of the Donee, the things that were given, and that are subject to this Right, in order to take them out of the Mass, and to return them back to the Donor, not as if he had always remained Proprietor of them, but as succeeding to such of the said Goods as remain still in the Inheritance. Thus it is by a kind of Succession that the Donor takes back the things which he had given: and we see that some Customs in *France*, instead of giving to Fathers and Mothers, and other Ascendants, the Reversion of the things given to their Children and Descendants, do barely ordain that they shall succeed to the things which they gave them. It follows from this nature of Reversion, whether we will consider it as a Succession to the things that are given, or as a Right independent of the quality of Heir, and which the Ascendant who is the Donor acquires a right to by the Donation it self; that the effect of this Right is limited, according to the nature of such Donation, to distinguish in the Inheritance the things that were given, in order to take them away from any other Heir besides him who has the Right of Reversion; but that the Reversion ought not to have the retroactive effect of an appropriation, which may hinder the Donee from mortgaging or alienating the Goods, and which may turn not only to the prejudice of the Donee, but even to the prejudice of third persons, who had reason to look upon the things that were given as being a part of the Donee's Goods, as well as the other Goods which he possessed by any other Title. And altho' it may be said against the Creditors who were prior to the Donations, that they had not reckoned upon the Goods which were given to their Debtor after their Debt was contracted, yet their condition ought not to be distinguished from that of the Creditors who were posterior to the Donation. For besides that the condition of the last Creditors ought not to be better than that of the first, the Goods which the Debtor

should afterwards acquire were likewise engaged to his prior Creditors, and the destination of the things that were given for the use and benefit of the Donee, implied much more the acquitting of what he already owed, than the facility of borrowing and contracting new Debts.

Altho' the Donee may dispose of the Goods given him to the prejudice of the Reversion, by alienating or mortgaging them, it does not thence follow, that if he commits any Crime, he subjects the said Goods to confiscation. For this kind of Engagement is not of the nature of those which hinder the effect of the Reversion, since on the contrary the Civil Death of the Donee who is condemned, ought to have the same effect to make way for the Right of Reversion as the Natural Death would have, but if the condemned person had Children, it might be said in behalf of the Forfeiture, that the case of the Reversion had not happened, and that therefore the Forfeiture ought to take place; since the Children hindering the effect of the Reversion, the things that were given would still belong to the Donee that is condemned, and by consequence would be included in the Forfeiture. But since the Children make this Right of Reversion to cease, when they survive after the natural death of the Donee their Father, and since the Goods fall to them by the said death, might we not give the same effect to the Civil Death, and make the said Goods to pass to the Children of this Donee, not as a Succession which should give them the Right of their Father, for the condemned person has no Heirs; but as an effect of the Donation, and of the intention of the Donor, who because of the incapacity which has happened to the Donee, would have the things given to pass to the Donee's Children, for they were not only given to this Donee, but the intention of the Donor was, that the Children should have them after their Father, preferably to himself. Or we might under another view consider the Donee as being dead without Children, since he died without Heirs: and restore to the Donor the things which he had given, but with the charge of keeping them for the Children of his Child to whom he had made the Donation. This we thought fit to mention, because it has been adjudged after this manner in one of the Parliaments of *France*, and because this

temperament

temperament seems to be conformable to Equity, and to the Spirit of the Rules of Law.

As to the Dispositions which the Donee might make by a Testament, we see that some of the Customs in *France* have limited this Right of Reversion to the case where there are no Children, nor any disposition made by the Donee; which leaves a liberty of disposing to the prejudice of the Reversion, both by Alienations, and by Dispositions made in prospect of death. And this Rule seems to be taken from the 25th Novel of *Leon*, where he blames as an abuse which had crept in contrary to the ancient Law, the Usage of not being at liberty to dispose by Testament, to the prejudice of the Reversion: and he re-established the said Liberty, reserving only to the Donor his Legitimate, or the Falcidian Portion. But we see on the contrary, in some Provinces which are governed by the written Law, that they observe there a Law that is quite the reverse, which favours in such a manner the Right of Reversion, that not only the Donee cannot dispose of the things that are given him by Testament, but that he cannot even alienate them, or mortgage them.

From these two extremes, the one which permits the Donee without distinction either to alienate, to mortgage, or to dispose by Testament; and the other which takes from him the liberty of all manner of disposition whatsoever, it has happened that in some places where the Law touching this matter is not so precisely determined, there have arisen several Law-Suits touching the validity of dispositions made by Donees to the prejudice of the Right of Reversion which the Law gives to Ascendants who are Donors; which has made many people wish that some provision were made therein. And if it may be allowed in the mean while to make one bare reflection on Rules which are so opposite the one to the other, it would seem that as to the Alienation and Mortgage, the reasons which have been observed render the Rule, or Usage which allows them favourable; and that as to Testamentary Dispositions, as they are not of the same necessity for the behoof of the Donee, as is the liberty of mortgaging and alienating, so neither are they within the intention of the Donor; but on the contrary we ought not to presume that he intended that a

Legatary should be preferred to him; it would not seem unjust that the Reversion should take away the liberty of disposing by Testament. And if, for instance, a Grand-father by the Father's side had given to his Grand-son an Estate in Land situated in a Country that is governed by the *Roman Law*; and that the said Grand-son had devised it to his Mother, who survived him, together with his said Grand-father, or if he had devised the said Land to one of his Friends; it would seem to be consonant both to Humanity and Equity, that the said Grand-father should have that effect of the Right of Reversion, so as to have the preference both of the Mother, and also of the Stranger: and that we might with very good reason, and without trespassing against the Principles and Spirit of the Laws, judge that the said Legacy had proceeded either from a Principle of ingratitude in the Donee, if he thought that the Donor would out-live him, or from a persuasion that his Grand-father would die before him. And either the one or the other of these considerations, being backed with the favour of the Right of Reversion, might unjustly make the said Legacy give place to the Right of Reversion, and introduce the Rule of the Provinces where Testamentary Dispositions are prohibited to the prejudice of the Right of Reversion. And as it would be neither reasonable nor possible to make the validity of the dispositions of Donees, to the prejudice of the Right of Reversion, to depend on the quality and circumstances of the said Dispositions, so as to ratify and confirm some of them which might be favourable, and to annul others, as containing some hardship; and likewise because the Rule ought to be simple and uniform; it would seem just, if there were a necessity of making a choice between these two opposite Rules, to annul rather all Dispositions of Donees made to the prejudice of the Right of Reversion, than to confirm them all without distinction; and this Rule, as well as that which permits the Alienation and the Mortgage of the said Goods, would be without any manner of inconvenience. For those who should be afraid of the effect and consequences either of the one or the other, might regulate the conditions of the Donations, and of the Reversion, as they should think fit, and either restrain or enlarge by their covenants, the liberty to alienate, to mortgage;

gage, and to dispose by Testament; for Covenants of this kind would be very lawful ^b.

^b See the twenty seventh Article of the second Section of the Rules of Law.

All that has been said hitherto concerns the Right of Reversion as it is regulated by Law, altho' there has been no agreement about it. But if the Reversion is stipulated by an express Covenant, whether it be by an Ascendant, or any other person, Relation or Stranger to the Donee, the Reversion in that case will have the effect which it ought to have by the Covenant. And unless it makes express mention of the liberty to dispose, it is the common opinion, that as an express stipulation seems to have more force than that which is barely given by the Law, the Reversion which is founded on an Agreement hinders all Dispositions. Which is still more equitable with respect to Donors who are not Ascendants. For since they have not the same affection for the establishment of the Donees, and their Families, as Ascendants have, it is natural to presume that the Covenant by which the Reversion is stipulated takes away from the Donee the liberty of all Dispositions to the prejudice of the Donors.

We have perhaps enlarged too much on a Subject which has but a few Rules in the Roman Law; and perhaps likewise we have said too little on a Subject that is of so frequent use, and so full of difficulties. But we thought that, without entering into a particular inquiry into the several sorts of difficulties, which would be endless and of no profit, it was necessary to take notice of the most material; and that it might be sufficient for deciding all those which may arise, to establish the Principles on which the Decisions may depend.

VI.

6. *The Father has the Reversion of the Dowry given by the Grandfather on the Father's side.* If a young Woman that is endowed by her Grand-father on the Father's side, having survived her Grand-father, dies without Children, her Father being alive, the Father takes back the Dowry as if he himself had given it, altho' he be not Heir to his Father who was Grandfather to the Daughter; and he excludes from it the Mother, and the other Children whom he has by her, and who might succeed with him. For as it is the duty of the Father to endow his Daughter, so it was for the Father's sake that the Grand-father did

endow his Grand-daughter. And this Dowry reverts to him by a double Right, both as representing his Grand-father, and as taking back a Gift which his Father had given for him, and on his account. Which is the reason why this Right is in his person independant on the quality of Heir to his Father, Grand-father to the Daughter, and that it was acquired to him in a manner from the moment of the Donation, that it might have its effect whenever the case thereof should happen ^f.

^f *Dorem quam dedit avus paternus, an post mortem avi mortua in matrimonio filia, patri reddi oporteat, quaeritur. Occurrit aequitas rei, ut quod pater meus propter me filiae meae nomine dedit, proinde sit atque ipse dederim. Quippe officium avi circa neptem ex officio patris erga filiam pendet. Et quia pater filiae, ideo avus propter filium nepti dorem dare debet. l. 6. ff. de collat.*

Altho' the Law quoted on this Article seems contrary to the 79th Law, ff. de jure dot. yet we thought that the Equity which was the motive thereof, ought to make the Rule, without its being necessary to examine in what manner these two Laws may be reconciled.

TITLE III.

In what manner BROTHERS, SISTERS, and other COLLATERALS do succeed.



WE have seen in the Preamble of this Second Book, that there are three Orders of Persons whom the Laws call to Successions. The first is that of Children, and other Descendants. The second of Fathers, and Mothers, and other Ascendants. And the third is of Collaterals; who are so called, because they descend every one by his Line from Father to Son, from an Ascendant that is common to them; which is the reason, that they are placed one at the side of the other, underneath the person from whom they descend.

SECT. I.

Who are the Collaterals.

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1. Definition of Collaterals.
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Father's side, Brothers by the Mother's side.

3. Uncles, Aunts, Nephews, Nieces.
4. Divers sorts of Uncles, Aunts, Nephews and Nieces.
5. Great Uncles, Great Aunts.
6. Grand Nephews, Grand Nieces.
7. Cousins.
8. First Order of Collaterals.
9. Second Order of Collaterals.
10. Third Order of Collaterals.

I.

1. Definition of Collaterals.

BY Collaterals, are meant all those who being neither Ascendants nor Descendants to one another, are descended either from the same Father, or the same Mother, or from another Ascendant that is common to them. Thus Brothers and Sisters are Collaterals to one another; thus the Uncle and Nephew are also Collaterals to one another; and Cousins the same^a.

^a Gradus cognationis alii superioris ordinis, alii inferioris, alii ex transverso, five à latere. l. 1. ff. de grad. & affin. Ex latere venientes. l. 9. §. 1. C. de natur. lib.

II.

2. Three kinds of Brothers; Brothers of the whole Blood, Brothers by the Father's side, Brothers by the Mother's side.

Among the Collaterals, the nearest are Brothers and Sisters^b, who are of three sorts. Those who are born of the same Father, and of the same Mother^c, whom we call Brothers of the whole Blood: those who are born of one and the same Father, but of different Mothers, who are called Brothers by the Father's side; and those who have one and the same Mother, but different Fathers, whom we call Brothers by the Mother's side^d.

^b Ex transverso five à latere fratres, & sorores. l. 1. ff. de grad. affin.

^c Fratres & sorores ex eodem patre, & ex eadem matre natos. Nov. 118. c. 3.

^d Qui ex uno parente conjuncti sunt defuncto five per patrem solum, five per matrem. d. C. 3.

III.

3. Uncles, Aunts, Nephews, Nieces.

The nearest of kin after Brothers and Sisters, are Uncles and Aunts; that is to say, the Brothers and Sisters of the Father, or Mother: and Nephews and Nieces; that is to say, the Children of Brothers or Sisters^e.

^e Ex transverso fratris fororisque filius filia, & convenienter patruus amita, avunculus matertera. l. 1. §. 5. ff. de grad. & affin.

IV.

4. Divers sorts of Uncles, Aunts, Nephews, and Nieces.

As we must distinguish among Brothers and Sisters, those who are Brothers or Sisters of the whole blood,

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that is to say, by the same Father and Mother; from those who are only of the half blood, that is, who have only in common the same Father, or the same Mother: so likewise among Uncles and Aunts, we may distinguish between those who are Brothers of the whole blood to the Father or Mother, and those who are only Brothers by the half blood, that is, either by the Father's side alone, or by the Mother's side alone. And the same distinction may be made among Nephews and Nieces, between those who are Children of Brothers or Sisters of the whole blood, and those who are Children of Brothers or Sisters by the half blood^f.

^f We take notice here of these several sorts of Uncles and Aunts, and of Nephews and Nieces, in order to distinguish these different kinds of Relations. For altho' these differences are not considered in the Roman Law, which restrains to Brothers and Sisters alone the distinction of Brothers by the whole blood, and Brothers by the half blood, and calls to Successions all the other Collaterals, according to their degrees, without distinguishing whether they be related by the Father alone, or the Mother alone, or by both, as shall be explained in the ninth Article of the following Section; yet it is necessary to know these different sorts of Kindred; and they are of use in the Customs of France, which appropriate Estates inherited by Descent, to the nearest of Kin on the Side, and in the Line, from which they descended; as has been already remarked.

V.

The Great Uncle is the Brother of^g the Grand-father or Grand-mother, whether it be by the Father's side, or Mother's side. And the Brothers of the remoter Ascendants, such as Great Grand-fathers. Great Grand-father's Father, and others, are likewise comprized in our language, under the name of Great Uncles; who may be distinguished by the degrees of first or second Great Uncle. And it is the same thing with respect to Great Aunts, whether those Great Uncles and Great Aunts be related by the whole blood, or by the half blood to the Ascendant whose Brothers and Sisters they are^h.

^g Ex transverso — patruus magnus, amita magna, id est, avi frater & soror, avunculus magnus, matertera magna, id est, aviae frater & soror. l. 1. §. 6. ff. de grad. & affin. v. l. 10. §. 15. & seq.

VI.

The Grand Nephew is the Nephew'sⁱ Grand Son, Grand-son to the Brother or Sister, whether he be descended of the whole Blood, or of the half blood. And all the Descendants of Nephews are likewise called Grand Nephews, who may be distinguished by the degrees of first and second Grand-Nephew. And

S f f f

what

what is here said of Grand Nephews, ought likewise to be understood of Grand Nieces^b.

^b Ex transverso fratris sororisque nepos neptis. l. 1. §. 6. ff. de grad. & aff. l. 10. §. 15. & seqq.

VII.

7. *Cousins.* All the other Collaterals are comprehended in our Language under the name of Cousins; the nearest of which are the Children of Brothers and Sisters, whom we call Cousin Germans; whether they be the Children of Brothers of the whole blood, or of the half blood. And it is the same thing with respect to the Children of Sisters, whether they be Sisters of the whole blood, or of the half blood; or to the Children of Brothers and Sisters. For in what manner soever the Brothers and Sisters are linked together, the name of Cousin Germans is given indifferently to the Children of the one with respect to the Children of the other. And as for the other Cousins more remote, they are to be distinguished according to their Ranks, in the Orders of the Collaterals, which shall be explained in the following Articlesⁱ.

ⁱ Eodem gradu (quarto) sunt & illi qui vocantur fratres patruales amitini amittinæ, consobrini consobrinx: hi autem sunt qui ex fratribus vel sororibus nascuntur, quod quidam ita distinxerunt; ut eos quidem qui ex fratribus nati sunt, fratres patruales, item eas quæ ex fratribus nate sunt, sorores patruales, ex fratre autem & sorore amittinos amittinas, eos verò & eas qui quæve ex sororibus nati nateve sunt, consobrinos consobrinas, quasi consororinos: sed plerique hos omnes consobrinos vocant. l. 10. §. 15. ff. de grad. & aff.

VIII.

8. *First Order of Collaterals.* We must distinguish in the Collaterals of any person, three different Orders. The first is of those who are placed at the side of that Person in the same Line, in such a manner that they are all equally distant with the said Person from the first Ascendant that is common to them. Thus Brothers and Sisters are at the same distance from their Father. Thus Cousin Germans are at the same distance from their Grandfather. And second Cousins are at the same distance from their Great Grandfather¹.

¹ This is a consequence of the preceding Articles, and which may be easily understood by a view of the Table of Kindred.

IX.

9. *Second Order of Collaterals.* The second Order of the Collaterals of any person, is of those who are at a less distance than they from the first A-

scendant that is common to them. The Uncle is not in so remote a degree from his Father, as is his Nephew, is Grand-son to his Father. Thus Cousin German of the Father of person, who is called Uncle according to the way in *Britanny*, being Grand-son of the Great Grandfather of the said person, is not at so great a distance as that person is from the said Great Grandfather. Thus the Cousin Germans of all the other Ascendants of any person, are less remote than the said person from the first Ascendants who are common to them^m.

^m See the Figure.

X.

The third Order of the Collaterals of any one, is of those who are more remote than the said person from the first Ascendant that is common to them. Thus the Nephew is at a greater distance from his Grandfather than his Uncle, who is Son to the said Grandfather. Thus the Son of the Cousin German of any person, who is called Uncle after the manner of *Britanny*, is at a greater distance from his Great Grandfather, who is their first common Ascendant. Thus all the Descendants of Cousin Germans, and of the others who are in the first Order, are more remote than the said person from the Ascendant of whom they are all descendedⁿ.

ⁿ See the Figure.

S E C T. II.

The Order of the Succession of Collaterals.

IT is to be observed on this Section, that whatever shall be said therein, touching the Proximity among Collaterals, who exclude one another according as they are nearer, is to be understood only with regard to the Provinces in *France*, which are governed according to the written Law. For in the Customs of *France* there are two contrary Rules. One which is common to all the Customs, which calls to the Succession of Estates inherited by Descent, not the nearest Collaterals without distinction, but those who are nearest on the side from whence the said Estate of Inheritance descended. Thus the Cousin German

German on the Father's side of the deceased will succeed to him in the Goods which descended to him from the Father's side, altho' the deceased had left behind him a Brother by the Mother's side, who was nearer to him than the said Cousin German. The other Rule which is peculiar to some Customs, is that which admits of Representation in the Collateral Line to an infinite degree: which makes that Collaterals of a more remote degree are not excluded by others who are nearer.

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1. Brothers are the first in the Order of Collaterals.
2. Brothers of the whole blood exclude the others.
3. The Children of the Brothers of the whole blood concur with their Uncles.
4. The Children of the Brothers of the whole blood, exclude the Brothers of the half blood.
5. Brothers by the Father's side alone, and those by the Mother's side alone, concur together.
6. The Children of Brothers of the half blood represent their Fathers.
7. The Right of Representation is limited to Brothers Children.
8. The Nephew is preferred to the Uncle, altho' in the same degree.
9. All the other Collaterals succeed according to their Proximity.

I.

1. Brothers are the first in the Order of Collaterals.

THE Succession of one that dies without Children, or other Descendants, and without Father, or Mother, or other Ascendants, passes to the Collaterals. And if the deceased had Brothers or Sisters, they will succeed in the first place^a, and will exclude all the others. But Brothers and Sisters succeed differently, according to the distinctions which shall be explained in the following Articles.

^a Si igitur defunctus neque descendentes neque ascendentes reliquerit, primos ad hereditatem vocamus fratres & sorores. Nov. 118. c. 3.

II.

2. Brothers of the whole blood exclude the others.

If the person whose Succession is to go to his Brothers alone, when there is no Descendant, or Ascendant, hath left behind him Brothers of the whole blood, and likewise other Brothers of the half blood, whether they be by the Father's side alone, or by the Mother's side alone,

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or of both these kinds, the Brothers of the whole blood, who would have concurred with the Ascendants if there had been any, will succeed all alone, and exclude the others^b, and their Descendants^c. And this Rule, as well as those which follow, are to be understood of Sisters as well as Brothers, whether the Sisters be alone, or that with them there are likewise Brothers, seeing their condition ought to be equal. But for the greater clearness, and for brevity's sake, we shall only name the Brothers alone.

^b Primos ad hereditatem vocamus fratres & sorores ex eodem patre & ex eadem matre natos, quos etiam cum patribus ad hereditatem vocavimus. Nov. 118. c. 3.

^c See concerning what is said in this Article, of the Brothers concurring with the Father and Mother, and other Ascendants, in the Succession of their Brother, the seventh Article of the first Section of the second Title.

^d Ex diverso siquidem superstes frater ex utroque parente conjungitur defuncto, premortuus autem per unum parentem jurebatur, hujus filios ab hereditate excludimus: sicut ipse si viveret ab hereditate excluderetur. d. Nov. 118. c. 3.

[We must observe here in relation to the distinction between the whole blood and the half blood, that the Law of England is different in this particular, according as the Succession regards Lands of Inheritance, or Personal Estate. In the case of Inheritances, the whole blood is always preferred; and the half blood is no blood inheritable by descent. Coke, 1 Instit. fol. 14. In Succession to Personal Estate, the Law has been more uncertain, the Statute 22 & 23 Car. 2. cap. 10. for the better settling of Intestates Estates, taking no notice of this distinction between the whole blood and the half blood, but directing the Distribution to be made among all those who are in equal degree of Kindred to the Intestate, and it being certain that Brothers and Sisters of the half blood are in the same degree with Brothers and Sisters of the whole blood, it has been the general opinion, that according to the said Statute of Distributions, Brothers and Sisters of the half blood were intitled to an equal share of the Intestate's Estate, with the Brothers and Sisters of the whole blood; altho' there have been several Precedents, where it has been judged since the Statute for the half Blood to have but a half share. But the Law in this particular, is now become fixed and certain, ever since the Decree of the House of Lords, in the Cause of Watts & alii versus Crooke, upon an Appeal from a Decree in Chancery, which had been given in favour of the half blood, and which was affirmed by the House of Lords. Shower's Cases in Parliament, pag. 108.]

III.

If together with the Brothers of the whole blood there are Children of another Brother of the whole blood, who died before the Brother whose Succession is to be divided; those Children will represent their Father, and will concur with their Uncles, Brothers to the deceased; and will have among them all the share which their Father would have had if he had been alive^d.

3. The Children of Brothers of the whole blood concur with their Uncles.

^d Si autem defuncto fratres fuerint, & alterius fratris aut sororis premortuorum filii, vocabuntur ad hereditatem isti cum de patre & matre suis masculis

maſculis & feminis. Et quantumque fuerint, tanquam ex hereditate præcipient portionem quantum eorum parens futurus eſſet accipere, ſi ſuperſtes eſſiet. Nov. 118. c. 3.

We muſt obſerve in this Article the firſt caſe of the Representation among Collaterals. See touching this Right of Representation, the fourth, ſixth, ſeventh and eighth Articles; and as for the Representation in the direct Line, ſee the ſecond and third Articles of the ſecond Section of the firſt Title.

It may be remarked in relation to the Right of Representation among Collaterals, that the ſaid Right hath its bounds, as it is explained in this Article, and in the fourth, ſixth, ſeventh and eighth Articles, and that it hath likewiſe the ſame bounds in many of the Cuſtoms in France; but in ſome of them the Representation takes place in the Collateral Line without any limitation, as has been obſerved in the Preamble to this Section: and that in other Cuſtoms there is no Representation at all in the Collateral Line, unleſs the ſame has been eſtabliſhed by Covenant; and that there are even ſome Cuſtoms which have aboliſhed the Representation in the direct Line of Deſcendants, as has been remarked on the ſecond Article of the ſecond Section of the firſt Title.

[The Law in England, as to the Right of Representation in the Collateral or Tranſverſal Line, is ſomewhat different in the Inheritance of Lands, from what it is in Succeſſion to Perſonal Eſtates. For in the caſe of Perſonal Eſtates, there is no Representation admitted among Collaterals after Brothers and Siſters Children. Stat. 22. & 23. Car. 2. cap. 10. §. 7. But in the Inheritance of Lands, this Right transferred by Representation is infinite and unlimited in the degrees of thoſe that deſcend from the Reſented, whether it be Deſcend Lineal, or Tranſverſal. Hale's Hiſtory of the Common Law of England, pag. 237.]

IV.

4. The Children of the Brothers of the whole blood exclude the Brothers of the half blood.

If the deceased left behind him no Brothers of the whole blood, but only Children of a Brother of the whole blood, that had died before him; and if there were alive Brothers of the deceased by the half blood, either by the Father's ſide alone, or the Mother's ſide alone, or of both theſe ſorts together; the Children of the Brother of the whole blood, Nephews to the deceased, would be preferred before their Uncles, Brothers to the deceased by the Father's ſide alone, or by the Mother's ſide alone, and would exclude them from the Succeſſion in the ſame manner as their Father would have done if he had been alive; and altho' they are in a remoter degree than their Uncles, yet representing their Father, they come in his place.

* Unde conſequens eſt, ut ſi fortè præmortuus frater, cujus filii vivunt, per utramque partem nunc deſunctæ perſonæ juncbatur, ſuperſtites autem fratres per patrem ſolum forſan aut matrem ei juncbantur, præponantur iſtiſque filii propriis hiis, licet in tertio ſint gradu: ſive à patre, ſive à matre ſint hiis, & ſive maſculi, ſive feminæ, ſicut eorum parens præponeretur ſi viveret. Nov. 118. c. 3.

V.

5. Brothers by the Father's ſide alone, and

When there are no Brothers of the whole blood, nor any of their Children, and that there are Brothers either by the

Father's ſide alone, or by the Mother's ſide alone, or Brothers of both theſe ſorts, they divide among them indifferently the Succeſſion by equal portions, according to the number of perſons.

* His autem non exiſtentibus (fratribus ſcilicet ex utraque parente conjunctis) in ſecundo ordine illos fratres ad hæreditatem vocamus qui ex uno parente conjuncti ſunt deſuncto, ſive per patrem ſolum, ſive per matrem. Nov. 118. c. 3.

It may be obſerved on this Article, that ſome Interpreters have been of opinion, that in the caſe where Brothers born of the ſame Father, and of a different Mother, concur with the Brothers by the Mother's ſide alone, theſe ought to inherit the Goods of their Brother which he had by his Mother, and thoſe other Brothers to inherit the Goods he had from his Father, and that they ſhould divide only among them the Goods which their deceased Brother had acquired ſome other way. This opinion is grounded on this, that Juſtinian had made a Law before this 118th Novel, by which he had ordained, that in the Succeſſion of any perſon, who dying without Children ſhould leave behind him a Father, together with Brothers, the Father in this caſe ſhould have the property of no part of the Goods but only the Uſufruct thereof; and that the Brothers ſhould have the property; and that if the deceased had Goods which he had inherited from his Mother, the Brothers by the ſame Mother with the deceased ſhould be preferred in thoſe Goods to the other Brothers. It is this Law which ſeems to have given riſe to the Rule in the Cuſtoms of France, which tranſmits the Goods to the Families from whence they came; and which appropriates the Paternal Goods to the Relations by the Father's ſide, and the Maternal Goods to thoſe on the Mother's ſide, *paterna paternis, materna maternis*, which has been extended to all the degrees in the Collateral Line. But other Interpreters have thought, that Juſtinian had aboliſhed this diſtinction between Paternal and Maternal Goods by the 118th Novel, and that he had abrogated that Law which had eſtabliſhed it; having made no mention of the diſtinction of Goods in this 118th Novel, no more than in his 84th Novel, where in regulating a Succeſſion between Brothers by the ſame Father and Mother, and Brothers by the Father's ſide alone, and Brothers by the Mother's ſide alone, he prefers the Brothers by the ſame Father and Mother, and

and makes no distinction of these two sorts of Goods, altho' the occasion did require it. Here he had an opportunity of explaining his mind in this matter, whether his intention had been to abolish this distinction, or without abolishing it, to leave to the Brothers by the Father's side the Paternal Goods, and to those by the Mother's side the Maternal Goods, and to give the preference to the Brothers by the same Father and Mother only in the other kinds of Goods. One word added to these two Novels, or at least to the 118th Novel, would have removed this difficulty; but since this Novel excludes indifferently the Brothers by the Father's side alone, or by the Mother's side alone from the Succession of their Brothers, when there are Brothers both by the same Father and by the same Mother, they seem to be thereby excluded equally from all sorts of Goods. And it is probably in this sense that this Novel has been understood in one of the Provinces in France which are governed by the written Law. Seeing they have there derogated from it by a contrary Rule, which directs that the Brothers of the half blood, whether it be by the Father alone, or by the Mother alone, should succeed with the Brothers of the whole blood to the Goods which came from their Stock^b.

^a L. 13. §. 2. Cod. de legit. hered.

^b See the sixty fifth Article of the fifth Chapter of the Customs of Bourdeaux, and Country of Guienne.

VI.

6. The Children of Brothers of the half blood represent their Fathers.

As the Children of Brothers of the whole blood concur with their Uncles, who were likewise Brothers to the deceased by the whole blood; so the Children of Brothers of the half blood concur likewise with their Uncles of the same quality, when the said Uncles succeed to their Brother, Uncle to the said Children; and every one of them representing their Father, they take among them all the portion that he would have had if he had been alive^b.

^b Ipsis fratrum filiis tunc hoc beneficium conferimus quando cum propriis judicantur tunc masculis & foeminis, sive paterni, sive materni sint. Nov. 118. c. 3.

VII.

7. The Right of Representation is limited to Brothers Children.

The Right of Representation, which puts Children in the place of their deceased Fathers, that they may succeed in the same manner as their Fathers would have done if they had been alive,

is limited to the Children of Brothers, and is not extended to the Children of other Collaterals, who succeed all by the head, according to their number of persons, and degree of Proximity; the nearest always excluding the remotest. Thus when the deceased has no Brothers, but only Uncles, and Children of another Uncle deceased, the Children of the deceased Uncle are excluded by the Uncles that are alive^a.

^a Hujusmodi verò privilegium, in hoc ordine cognationis, solis præbemus fratrum masculorum & foeminarum filiis aut filabus, ut in suorum parentum jura succedant. Nulli enim alii omnino personæ, ex hoc ordine venienti, hoc jus largimur. Nov. 118. c. 3.

[It has been already observed, that in the Succession to Personal Estates in England, no Representations are admitted among Collaterals after Brothers and Sisters Children. Stat. 22. & 23. Car. 2. cap. 10. §. 7.]

VIII.

If the deceased left behind him neither Descendants, nor Ascendants, nor Brothers, nor Sisters, but only an Uncle, and a Nephew; the Nephew would succeed to him, and exclude the Uncle. For altho' they are both of them in the same degree of Proximity, yet the Nephew has the Right of Representation of his Father, Brother to the deceased, who would be preferred before the Uncleⁱ; and the Uncle on his part has no manner of Right of Representation, according to the Rule explained in the foregoing Article.

ⁱ Quandoquidem igitur fratris & sororis filiis tale privilegium dedimus, ut in propriorum parentum succedentes locum, soli in tertio constituti gradu cum iis qui in secundo gradu sunt ad hereditatem vocentur, illud palam est, quia Tunc defuncti masculis & foeminis, sive à patre, sive à matre præponuntur: si etiam illi tertium cognationis similiter obtineant gradum. Nov. 118. c. 3.

Some Interpreters have been of opinion, that the Rule explained in this Article, ought only to be understood of the cases where there are Brothers to the deceased who are living and exclude the Uncle; but that when there are only Uncles and Nephews, without Brothers to the deceased, they ought to succeed together; and the Succession is so regulated by the Customs of some places. But there are many considerations which seem to require that the Nephews to the deceased should be preferred to his Uncles, even in the case where the deceased has no Brothers alive. For besides the reason taken notice of in the Article, that it is only the Children of Brothers that have the Right of Representation, as has been mentioned

tioned in the preceding Article, and that the Uncles do not represent their Father, Grand-father to the deceased; if we examine the words of the text quoted on this Article, they bear so naturally the sense of giving always the preference to the Nephews of the deceased before his Uncles, that they do not seem to be capable of having any other construction put upon them. For first, it is there said, that the Nephews are considered as being in the same degree with their Fathers, by the Right of Representation. Thus, the Law gives them a rank which precedes that of the Uncles of the deceased. And in the second place, it is there said expressly, that the Nephews of the deceased are preferred before their Uncles; which would not be true, if the Uncles might succeed together with the Nephews, and were only excluded by the Brothers.

Might we add to these reasons, that it is natural that Inheritances should descend rather than ascend? And that thus the Nephews being in the Rank of Descendants, they ought to be preferred to the Uncles, who are in the Rank of Ascendants. But this argument would prove too much, if we should extend it to the Collaterals who are in a remoter degree than the Uncles and the Nephews: For, as shall be shewn in the following Article, the 118th Novel calls to the Succession all the Collaterals without distinction, except Brothers, and Brothers Children, according to their degrees; the nearest always excluding the remotest; and those who are in the same degree concurring together, without any distinction of the Lines which are below that of the Brothers, and of those which are above it, and without any Representation.

But if we suppose that the Nephews, Children of the Brother of the deceased, are Children only of a Brother of the half blood, ought they to be preferred to the Uncle of the deceased? It would seem that the same reasons which give the preference to the Children of Brothers of the whole blood, give it likewise to the Children of Brothers of the half blood. For besides that the double tie is only considered among Brothers, and that among all the other Collaterals the Proximity alone distinguishes their Ranks; according to the Rule of the following Article; the Children of Brothers of the half blood representing their Fathers, who would exclude the Uncles of the deceased, they have the same right which their Fathers would have had, if they had been alive.

We ought not to omit adding here a Remark concerning another case which falls out very often, and in relation to which some Interpreters have started a question. It is the case where an Inheritance being to be divided among the Children of Brothers to the deceased, he having no Brothers alive, and the said Children being in an unequal number, three, for example, of one Brother, and four of another: Whether those Children of the Brothers ought to succeed by the head, according to their number, or by Representation, the Children of each Brother taking the Share which their Father would have had. Before the 118th Novel of Justinian, this question was decided by the 2^d Law, §. 2. ff. de suis & legit. hered. which provided, that the Children of Brothers should succeed by the head, according to their number. *Hac hereditas proximo agnato, id est, ei quem nemo antecedit, defertur: & si plures sint ejusdem gradus, omnibus in capita scilicet. Ut puta, duos fratres habui, vel duos patruos; unus ex his unum filium, alius duos reliquit: hereditas mea in tres partes dividitur.* It is true, that this 118th Novel has given to the Children of Brothers the Right of Representation, which has occasioned some to fancy, that in this case the Children of Brothers deceased ought likewise to have this Right. But the benefit of the Representation given to the Children of Brothers by this Novel, is only to make them concur with their Uncles, Brothers to the deceased, to take the portion that their Father would have had, if he had been alive. And the motive of this Law, is not to distinguish the condition of the Children of Brothers among themselves, when there are no Brothers to the deceased, and to make the Nephews to the deceased by several Brothers share unequally, according as the Children of one of the Brothers shall happen to be in a greater number than the Children of another; so that this motive of the Representation ceases among them, when they succeed all alone; and without Brothers to the deceased. And they succeed then only according to their Proximity, which being equal, makes them succeed by the head. And it is in this manner that their Succession is regulated by the Laws of the *Wisigoths*, which are for the most part taken from the *Roman Law*. *Qui moritur, si fratres aut sorores non reliquerit, & filios fratrum & sororum reliquerit; si ex uno fratre sit unus filius,*

filius, & ex alio fratre vel sorore forsitan plures, omnem hereditatem defuncti capiant; & equaliter per capita dividant portiones. lib. 4. legis Wisigotorum tit. 2. capitul. 8.

IX.

9. All the other Collaterals succeed according to their Proximity.

After Brothers and the Children of Brothers, all the other Collaterals succeed according to their degrees of Proximity, without any other distinction, the nearest excluding always the remotest. And if there happen to be several in the same degree, they succeed equally by the head, and according to their number¹.

¹ Si verò neque fratres neque filios fratrum, sicut diximus defunctus reliquerit, omnes deinceps à latere cognatos ad hereditatem vocamus, secundum uniuscujusque gradus prerogativam. Ut viciniore gradu ipsi reliquis præponantur. Si autem plurimi ejusdem gradus inveniantur, secundum personarum numerum inter eos hereditas dividatur. Quod in capita nostræ leges appellant. Nov. 118. c. 3.

S E C T. III.

Of the Succession of the Husband to the Wife, and of the Wife to the Husband.

IT is not necessary to repeat here what has been said concerning this kind of Succession, in the Preface to this Second Part, N^o. II. and in the Preamble of this second Book; where the Reader may see the reason which has obliged us to set down here this Rule.

The CONTENTS.

1. *How the Husband succeeds to the Wife, and the Wife to the Husband.*

I.

1. How the Husband succeeds to the Wife, and the Wife to the Husband.

THE Husband succeeds to his Wife, and the Wife to her Husband, if either of them die without Children, without Relations, and without a Will, and the Survivor will exclude the Exchequer.

^{*} Maritus & uxor ab intestato invicem sibi in solidum, pro antiquo jure succedant, quoties deficit omnis parentum, liberorumve, seu propinquorum legitima vel naturalis successio, fisco excluso. l. un. C. unde vir & uxor. l. un. ff. eod.

[According to the Law of Succession to Personal Estates in England, if a man dies intestate, leaving behind him a Wife and Children, the Wife of the Intestate is intitled to one third part of her Husband's Estate, and all the Residue goes to the Children, to be

distributed amongst them by equal portions. And in case there be no Children, nor any legal Representatives of them, then one Moiety of the said Estate is to be allotted to the Wife of the Intestate, and the Residue of the said Estate is to be distributed equally to every of the next of Kindred of the Intestate, who are in equal degree, and those who legally represent them. Stat. 22. & 23. Car. 2. cap. 10.]

[The said Statute for settling Intestates Estates having made no mention of the Husband's Right to the Personal Estate of his Wife, which was not in her Possession during the Coverture, and which the Husband had not acquired the right to by the Intermarriage, the Law touching the same was become somewhat uncertain, whether the said Estate should go to the surviving Husband, or to the Relations of the deceased Wife. And therefore to remove this doubt, it was thought fit to explain the aforesaid Statute by a subsequent Act of Parliament, whereby it is declared, that the said Act, For the better settling of Intestates Estates, shall not be construed to extend to the Estates of Feme-Coverts that shall die intestate, but that their Husbands may demand and have Administration of their Rights, Credits, and other Personal Estates, and recover and enjoy the same, as they might have done before the making of the said Act. Stat. 29 Car. 2. cap. 3. §. ult.]

T I T L E IV.

Of the COLLATION of GOODS.



WHEN there are Children, or other Descendants that succeed to their Father, Mother, or other Ascendants, whether by Testament or by Law, when the person dies intestate^a, they ought reciprocally to bring in that which they had received out of the Estate of the person to whom they succeed; that is to say, to join it to the mass of the Goods of the Succession, and to divide it among them with the other Goods, according as they may be obliged to this Collation by the Rules which shall be explained in this Title.

^a See the tenth Article of the third Section of this Title.

The first use that was made in the Roman Law of the Collation of Goods, and which was the Origin of it, was a consequence of the ancient Law, which excluded the Children that were emancipated from the Succession of their Fathers, when there were Children that were not emancipated. For when afterwards the emancipated Children were admitted to share in the Succession, they were obliged to bring into the Mass of the Inheritance that was to be divided in common among them and their Brothers who had remained still under their Father's Power and Authority, that which

which the emancipated Children had acquired from the time of their emancipation. Because, as has been remarked in other places, that which the emancipated Son acquired after his emancipation, did belong wholly to himself; whereas all that the Son who was not emancipated acquired on his part, belonged wholly to his Father, except only that which was reckoned as a peculiar Patrimony, of which we have spoken in its proper place^b. Thus there were two considerations that favoured this Law of the Collation of Goods; one was, because the emancipated Son succeeding to his Father reaped the benefit of whatever his Brother that was not emancipated had acquired. And the other was, because that altho' the Son who was not emancipated had made no Acquisitions, yet it was by favour that the emancipated Son shared in the Succession with him, and therefore it was but just that the Succession should be augmented with what he had acquired only by the benefit of his emancipation.

^b See the fifth Article of the second Section of Persons, the beginning of the Preamble to the second Section of the second Title of this second Book, and the third Article of the third Section of this Title.

In process of time all the Children without distinction, whether they were emancipated or not, having been allowed to enjoy the absolute property in whatever they acquired, as has been remarked in the Preamble of the second Section of the second Title of this Book, this first kind of Collation ceased^c. And the use of the Collation was reduced to the Goods which the Children, whether they were emancipated or not, had acquired by the liberality of the Ascendant to whom they were to succeed, together with the other Children who had not received the like bounties from the said Ascendant.

^c V. l. ult. C. de collat.

It is of this kind of Collation that we are to treat under this Title. And as this matter takes in that which concerns the nature of the Collation, the persons who are obliged to it, together with the persons to whom the Collation is to be made, and the Goods that are subject to it, these three parts shall be the subject matter of three Sections.

[The Collation of Goods here treated of, is the same with what is called in the Common Law of England by the name of Hotchpot, which is described to be a blending or mixing together, and a partition of Lands

given in Frank-Marriage, with other Lands in Fee-simple descended. See the Terms of Law, verb. Hotchpot.]

[And this Collation of Goods takes place likewise in the distribution of the Personal Estates of Intestates. For by the Statute of Distributions it is provided, that in case any Child, other than the Heir at Law, shall have any Estate by Settlement from the Intestate, or shall be advanced by the said Intestate in his Life-time, by Portion not equal to the Share which will be due to the other Children by the Distribution, then so much only of the Surplusage of the Estate of such Intestate shall be distributed to such Child or Children as shall have any Land by Settlement from the Intestate, or were advanced in the life-time of the Intestate, as shall make the Estate of all the said Children to be equal, as near as can be estimated. Stat. 22 & 23 Car. 2. cap. 10. §. 5.]

SECT. I.

Of the nature of the Collation of Goods.

The CONTENTS.

1. Definition of the Collation.
2. What ought to be restored, & does not properly come under the name of Collation.
3. All the Children are obliged to this Collation without distinction.
4. The Collation is regulated by the Law, or by some Act of the Testator or Donor.
5. How these two sorts of Collation are regulated.
6. Collation of the Revenues.
7. He who is bound to collate, recovers the expences laid out upon the Goods subject to the Collation.
8. The Heir must either bring in what he has received, or take less for his share.
9. He who brings in the Goods subject to Collation, increases the number of the Sharers in the Partition.

I.

THE Collation of Goods is the engagement of the Children, and other Descendants, to bring into the Mass of the Inheritance of their Father, Mother, or other Ascendant to whom they are desirous to succeed, the Things which had been given them by the said Ascendant, that they may be divided between them and their Co-heirs, in the same manner as the other Goods of the Succession. And the Equity of this Collation is very evident^a, the same being founded on the natural Equality among the Children in the Succession of their Ascendants; and upon the presumption that

^a Definition of the Collation.

that such a Gift was made only by way of advancement to the Donee of a part of that which he might expect out of the Succession.

^a Hic titulus manifestam habet aequitatem. l. 1. ff. de coll. bon.

We don't put down here the rest of this Text, the same not being in use with us. But these first words may be applied in general to all the cases where the Collation ought to take place. See the seventh and following Articles of the third Section.

II.

2. What ought to be restored, does not properly come under the name of Collation. It follows from the Rule explained in the foregoing Article, that the Collation being only to be understood of some Thing which did already belong to the Heir who is obliged to make the Collation; we ought not to include in this matter of the Collation of Goods, that which is a part of the Inheritance, and which one of the Heirs possesses by some other Title; as if he was Depositary of a Thing which the deceased had deposited in his hands, or Debtor for a Sum of Money which the deceased had lent him, or that it was by some other means in possession of some of the Goods of the Inheritance. For this Heir would be bound to make restitution of these kinds of things upon another score than that of Collation. Neither must we reckon among the things subject to the Collation treated of here, that which a Testator who leaves by his Will to one of his Children a certain Estate in Land, or some Office, obliges him to pay in to the other Children, as a Sum of Money in consideration of the said advantage.^b

^b Since the Collation is understood only of the Things which had been given to the Children by the Ascendants to whom they succeed; it is only improperly that we can give the name of Collation to the Restitutions which are spoken of in this Article.

III.

3. All the Children are obliged to this Collation, without distinction. The engagement of the Heir of an Ascendant that is obliged to this Collation towards the other Heirs of the same Ascendant, being founded upon the motives explained in the first Article, which agree equally to the Children of both Sexes, to the Children that are emancipated, and to those who are not, to the Children and Grandchildren of all degrees; this engagement is common without distinction to all these sorts of Children and Descendants, for all the things that may be subject to the Collation, according to the Rules which shall be explained in the third Section.^c

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^a Ut liberis tam masculini quam foemini sexus, five sui juris, five in potestate constitutis, quocumque jure intestate successione, id est, aut testamento penitus non condito, aut si factum fuerit, contra tabulas bonorum possessione petita, vel inofficiosi querela mora rescisso, aequa lance parique modo prospici possit: hoc etiam aequitatis studio presenti legi credidimus inferendum, ut in dividendis rebus ab intestato defunctorum parentum, tam dos, quam ante nuptias donatio conferatur. l. 17. C. de collat.

Altho' this Text makes mention only of the Collation in the Succession of Intestates, yet it takes place likewise in the Testamentary Successions. See the tenth Article of the third Section.

[In the distribution of the Personal Estates of Intestates in England, a distinction is made between the Heir at Law and the other Children. For the Heir at Law, notwithstanding any Land that he shall have had by descent, or otherwise, from the Intestate, is to have an equal part in the Distribution, with the rest of the Children, without any consideration of the value of the Land which he hath by descent, or otherwise, from the Intestate. Stat. 22 & 23 Car. 2. cap. 10. §. 5.]

IV.

The Collation of Goods among Co-heirs is made in two cases, and differently. One is the case where the Ascendant, to whom his Children, or other Descendants are to succeed, has directed nothing touching the Collation of the Goods which he has given to one of the Children; which would be no hindrance why the said Donee should not be obliged to the Collation by the bare effect of the preceding Rules, and of those which shall be explained in the third Section, and this Collation is founded on Equity, and on the Law which has established it. The other is the case of a Collation ordained by some disposition of the Donor, such as the Donation it self, or a Testament, which has regulated the conditions thereof.^d

^d See the eleventh Article of the third Section.

V.

If the person to whom two or more Heirs are to succeed, has made some disposition for regulating the Collations which they shall make among themselves, the said disposition will be instead of a Law, according to the Rules which shall be explained in their place.^e And if the deceased has ordered nothing concerning the Collations among his Heirs, they shall have for Rules those that are explained in this Title.

^e See the seventh Article of the first Section of the first Title of the third Book.

VI.

The Heir who is bound to bring in 6. Collation to his Co-heirs that which had been given him, ought likewise to bring in the

the Fruits or other Revenues thereof according to the nature of the Goods, such as the Interest, if it is Money, the said Revenues to be counted from the time that the Succession was open^f.

^f Filia quæ soluto matrimonio dotem conferre debuit, moram collationi fecit: viri boni arbitratu cogetur usuras quoque dotis conferre: cum emancipatus frater etiam fructus conferat, & filia partis suæ fructus percipiat. l. 5. §. 1. ff. de dot. collat.

Altho' this Text speaks only of the Dowry, yet the reason is the same for all Collations. And altho' it be said here, that the Interest is due by him who delays to bring in what he is bound to do, and that it may be doubted, whether the Interest be due before the demand, yet it is but just that it should rise from the moment that the Succession to which the Collation is to be made is open; and as the other Goods of the Succession, and the Revenues which they produce, are reckoned in the Partition from that time, so the Goods subject to the Collation are of the same kind, and are a part of the Inheritance, and therefore the Fruits and Produce thereof are due as well as the other Goods. This is regulated after this manner by some of the Customs, and is a consequence of the Rule explained in the sixth Article of the second Section of Partitions. And it may be likewise said, that every Heir who has Goods subject to Collation, acts an unfair and dishonest part, if he does not bring them in, or does not declare what Goods he has of this kind.

VII.

7. He who is bound to collate, recovers the expences laid out upon the Goods subject to the Collation. If for the preservation of the Thing subject to Collation, or for other necessary causes, the Heir who ought to bring it in has been at any charges, he shall recover the value of them, or retain the Thing: As if he has laid out any thing on the necessary Repairs of a House, or if he has carried on a Law-suit for the recovery of a debt, or of some Right. For these sorts of expences diminishing the Goods, the Collation of them is likewise diminished in so much^g.

^g Cum dos confertur, impensarum necessarium fit detractio: cæterarum non. l. 1. §. 5. ff. de dot. collat. See the twelfth and the following Articles of the third Section of Dowries.

VIII.

8. The Heir must either bring in what he has received, or take less for his share. The Heir who is bound to bring in what he has received by advancement, may satisfy that Obligation in two manners. One is by bringing in actually the thing that is subject to the Collation, that it may be included in the Mass of the Goods, in order to be divided with the rest. And the other way is, by retaining that which he ought to bring into the Mass, and taking too much less out of the rest of the Goods. These are the two ways of Collation which are expressed in these words, *to bring into the Mass of the Goods, or to take less out of it*^h.

^h Sed & si tantum sortè in bonis paternis emancipatus remittat, quantum ex collatione suis ha-

bere debet, dicendum est emancipatus collationem non habere. l. 1. §. 12. ff. de collat. l. 5. C. cod.

Conferre, aut minus tanto accipere.

IX.

The Collation is made in such a manner, that whatever is brought in is added to the Mass of the Goods, the whole is divided into as many portions as there are Heirs; including those who collate, and those to whom the Collation is madeⁱ.

ⁱ Collatio in eundem modum que confert etiam suam personarum faciendis. l. 1. m. f. ff. de co.

SECT. I.

Of the persons who a collate, and to whom collation ought to be made.

The CONTENTS.

1. *There is no Collation, but among Children.*
2. *He who renounces the Inheritance, does not collate, unless it be his own or Child's part.*
3. *To whom the Collation ought to be made.*

I.

IT is only the Children or other Descendants, Heirs to their Fathers, Mothers, or other Ascendants, who are obliged to the Collation treated of in this Title; because the motives of the Laws which ordain this Collation agree only to them¹.

¹ See the first and third Articles of the first Section, and the texts which are there quoted. See the following Articles.

Of the three Orders of Heirs, Descendants, Ascendants, and Collaterals, it is only the first, in which are to be found the motives of the Right of Collation explained in the preceding Section. And the case of Collation does never happen even among Ascendants; For the Descendants do not make any presents to them. And as for the Collateral Successions, the motives of the Collation not agreeing to them, there is never any Collation in them, unless it be ordained by the person whose Inheritance is to be divided.

II.

If the Children, or other Descendants, who had Goods subject to Collation, abstain from the Inheritance, the Collation ceases. And as the share in the other Goods of

legitime, or
Child's part
of the others.

ritance, so neither do they give to the other Children or Descendants any share of the Goods which they had acquired before the Succession was open^b. But if what remains in the Succession is not sufficient for the Legitime or Child's part of the other Children, reckoning into the Father's Estate the Goods that ought to have been brought in by him who abstains from the Inheritance, if he had declared himself Heir; in that case he would be obliged to give part of them to the others, so as to make up what they want of their Legitime, or Child's part^c.

^a Ex causa donationis, vel aliunde tibi quaesita si avi successionem respueris, conferre fratribus compelli non potes. l. 25. C. fam. triscand.

Fuit quaestio, an si sua haeres filia patri cum fratribus, contenta dote abstineat se bonis, compellatur eam conferre? & Divus Marcus rescripsit, non compelli abstinentem se ab hereditate patris. Ergo non tantum data apud maritum remanebit, sed & promissa exigetur etiam à fratribus? & est acri alieni loco, abscessit enim à bonis patris. l. ult. ff. de dot. collat.

The liberty of being free from the Collation upon renouncing the Inheritance, is generally received in France, except in some particular Customs, where Children who are Donees in the Families of those who are ignoble are obliged to bring into the Mass of the Inheritance whatever has been given them by the Father, or Mother, or other Ascendants, altho' they renounce the Succession of the Donor.

^c Cum omnia bona à matre tua in dotem dicantur exhausta, leges legibus concordare promptum est: ut ad exemplum inofficiosi testamenti, adversus dotem immodicam exercendae actionis copia tribuatur. Et filiis conquerentibus emolumenta debita conferantur. l. un. C. de inoff. dot. Debitum bonorum subsidium consequantur. l. 5. C. de inoff. donat.

III.

3. To whom
the Collati-
on ought to
be made.

As the Collation takes place only among Children that are Co-heirs, so it is due only to those who have these two qualities. Thus the Children who have no share in the Inheritance, whether it be that they renounce it, or that they are excluded from it by being disinherited, have likewise no share in the Collation^d.

^d This is a consequence of the first Article.



SECT. III.

Of Things which are subject to Collation, and of those which are not.

The CONTENTS.

1. Two sorts of Goods of Children.
2. The Goods acquired otherwise than from the Ascendants, are not subject to Collation.
3. The peculiar Patrimonies of the Son are not subject to Collation.
4. The Son does not bring in that which the Father was bound to give him.
5. The Expences of Education are not brought in.
6. The things given to one of the Children as an advantage over and above what the others have, are not subject to Collation.
7. Dowries and Donations in favour of Marriage are brought into the Mass of the Goods.
8. Collation of the Dower, when the Husband is insolvent.
9. All other Donations are brought into the Mass of the Inheritance.
10. Whatever may be reckoned as a part of the Legitime, or Child's part, ought to be brought in.
11. The Collation is due, whether the deceased left behind him a Testament, or died intestate.
12. The Daughter brings into the Succession of the Father, the Portion given her by the Grandfather on the Father's side.
13. The Things which have perished without the fault of the Donee, are not brought in.
14. What is consumed by use ought to be brought in.

I.

WE must distinguish two sorts of Goods, which Children, or other Descendants may have, that are to divide among them the Succession of their Father, Mother, or other Ascendant. One sort is, of the Goods which they had from their Father, Mother, or other Ascendant, by some Title, which the following Rules make subject to Collation. And the other sort is, of the Goods which they may have acquired any other way, by what Title soever it may

1. Two sorts
of Goods of
Children.

may be; whether by the liberality of other persons besides their Ascendants, or by their own industry, or by other ways^a.

^a There can be no Goods but what are contained under one or other of these two kinds.

II.

2. The Goods acquired otherwise than from the Ascendants, are not subject to Collation.

Whatever the Children may have acquired any other way than from the Goods of their Ascendants, whether they have acquired it by a Testamentary Succession, or by succeeding to Intestates, or by Donation, or any liberality of other persons, or by their own industry, belongs entirely to themselves, and is not subject to Collation^b.

^b See the first Article of the second Section, In what manner Fathers succeed.

III.

3. The peculiar Patrimonies of the Son are not subject to Collation.

The peculiar Patrimonies which have been mentioned in the third Article of the second Section of the second Title, are the proper Goods of the Son who is still under his Father's Power, which not being descended to him from his Father, or other Ascendant, are not subject to Collation. And seeing these sorts of Goods belong so absolutely to the Son, that his Father has not so much as the Use and Profits of them, it would not be just that the Co-heir should have any share in them^c. But that which a Son who is still under his Father's Authority may have gained by his management and administration of some Goods which the Father had intrusted him with, belongs properly to the Father, and is subject to Collation^d.

^c Nec castrense, nec quasi castrense peculium fratribus confertur. Hoc enim præcipuum esse oportere, multis constitutionibus continetur. l. 1. §. 15. ff. de collat. bon. l. ult. C. eod.

^d Cum fratres tui durantes in familia patris peculium (si hoc neque castrense, neque relictum eis doceatur) præcipuum habere non possint. Sed in divisionem paternæ veniat hereditatis. l. 12. C. de collat. See the first and seventeenth Articles of the second Section of the second Title.

IV.

4. The Son does not bring into his Father's estate what he has acquired by his own industry, or by other means, unless he has been bound to give him.

If a Father had been required by a Testament, or other disposition of any person, to give to his Son a Sum of Money, or some other thing; that which this Son possesses under this Title, would not be subject to be brought into the Succession of his Father; because it would not be to the Father's bounty that the Son owed this thing^e.

^e Si ab ipso patre hærede instituto fideicommissum fuerit relictum; cum morietur, an id conferen-

dum est, quoniam utile est hoc fideicommissum? & eveniet ut pro eo habeatur atque si post mortem patris relictum fuisset: nec cogetur hic conferre, quia moriente eo ejus non fuisset. l. 1. §. 19. ff. de collat.

V.

The Children, or other Descendants, succeeding to the Inheritance of their Father, or Mother, or other Ascendant, do not bring in that which has been laid out upon their Studies, or in other Expences which their Education may have required. For these sorts of Expences are what Parents are bound to lay out upon their Children, and are as it were a debt which they ought to acquit^f.

^f Quæ pater filio emancipato studiorum causa peregræ agentis subministravit, si non credendi animo pater misisse fuerit comprobatus, sed pietate debita ductus: in rationem portionis, quæ ex defuncti bonis ad eundem filium pertinuit computari æquitas non patitur. l. 50. ff. fam. erisc.

VI.

The Things given to Children, or other Descendants, that they may have what is so given as an advantage over and above what the other Children their Co-heirs have, are not brought into the Mass of the Inheritance collated, if it is evident that it was the express will of the Donor, that what he gave should remain with the Donee as an advantage over and above his equal share with the rest of the Heirs, or that it should not be subject to Collation^g. But if upon a computation of the thing given as an advancement to a Child, together with the Goods which remain in the Inheritance, it should be found that the other Children had not their Legitime, or Child's part of the whole, the Donee would be obliged in this case to bring into the Mass of the Goods, so much as to make up the Legitime, or Child's part of the others, even altho' he should be willing to content himself with the Gift, and to renounce the Inheritance^h.

^g (Sancimus) omnino esse collationes, & exinde æqualitatem secundum quod olim dispositum est. Nisi expressim designaverit ipse se velle non fieri collationem, sed habere eum qui cogitur ex lege conferre, & quod jam datum est, & ex jure testamenti. Nov. 18. c. 6.

If there were a Donation, or other Disposition, which should contain a Gift as an advantage to one Child over and above what the others should have to their shares, this bare expression of giving that by way of preference or distinction to that Child, would make the Collation to cease. For otherwise, if the Child were obliged to bring it in and share it with the others, it would be no particular advantage to the said Child.

^h Si quis donationem immensam in aliquem aut aliquos filiorum fecit, &c. Nov. 92. c. 1. See the fourth and fifth Articles of the third Section of the Legitime.

VII. What-

VII.

7. Dowries
and Donations
in fa-
vour of
Marriage,
are brought
into the Mass
of the Goods.

Whatever a Father, Mother, or other Ascendants, whether they be by the Father's or Mother's side, of both Sexes, give to their Children, or other Descendants, on occasion of their Marriages, whether it be to a Son, as a Settlement upon him in favour of his Marriage, or to a Daughter for her Marriage Portion, or otherwise, according to the different uses of Donations of this kind, is subject to Collation. Thus Children, Sons or Daughters, succeeding to the Inheritance of an Ascendant from whom they had received such like liberalities, ought to bring them into the Mass of the Goods of the Inheritance.

Ut liberis tam masculini quam foemini sexus, five sui juris, five in potestate constitutis, quocumque jure intestatae successionis, id est, aut testamento penitus non condito, aut si factum fuerit, contra tabulas bonorum possessione petita, vel inofficiosi querela mota rescisso, aequa lance parique modo prospici possit: hoc etiam aequitatis studio praesens legi credidimus inferendum, ut in dividendis rebus ab intestato defunctorum parentum, tam dos quam ante nuptias donatio conferatur, quam pater vel mater, avus vel avia, proavus vel proavia, paternus vel maternus dederit, vel promiserit pro filio vel filia, nepote vel nepte, pronepote vel pronepte, nulla discretionis intercedente, utrum in ipsas sponfas pro liberis suis memorati parentes donationem contulerint, an in ipsos sponfos eorum, ut per eos eadem in sponfas donatio celebretur: ut in dividendis rebus ab intestato defuncti parentis, cujus de hereditate agitur, eadem dos, vel ante nuptias donatio ex substantia ejus profecta, conferatur. l. 17. C. de collat.

Altho' this Text makes mention only of the Succession to Intestates, yet it is the same thing in Testamentary Successions.

Must we comprehend under liberalities in favour of Marriage which are subject to Collation, that which a Father, a Mother, or other Ascendant makes a present of to his Son, or his Daughter-in-law, to his Daughter, or his Son-in-law, such as is mention'd in this Law, the Expenses of the Wedding, the Wedding-Clothes, the Wife's Paraphernalia, or other Presents according to custom? There are some Customs in France which direct those sorts of Presents to be brought in, and others which exempt them from the Collation. Thus we ought to judge of this matter according to the Usage of the place, if there is any, or according to the circumstances of the quality of the persons, of the nature of the presents, and of their value.

VIII.

8. Collation
of the Dowry
when the
Husband is
insolvent.

If a Daughter having been endowed by her Father, Mother, or other Ascendant, should come to inherit to him, and her Husband who had received and squandered away her Marriage Portion, should happen to be insolvent, she would nevertheless be obliged to reckon it in the Mass of the Goods to be divided between her and the other Heirs, if by the circumstances this loss may be imputed to her; as if she had neglected to

secure herself by a Separation of Goods, or to take other precautions for the Security of her Marriage Portion¹. But if nothing can be laid to her charge, as if she was a Minor, and that the said loss had happened thro' the fault of the person who had given the Marriage Portion, her Father, for example, or her Grand-father by the Father's side, who in default of the Father, who was either dead, or absent, interdicted, or in a state of madness, being obliged to endow his Grand-daughter, had paid the Portion to the Husband whose insolvency was apparent, or at least much to be feared, she might be discharged from this Collation according to the circumstances, in bringing in only the Action for the restitution of the Marriage Portion, against the Husband or his Heirs^m. But if it was the Grand-father by the Mother's side, or other Ascendant, who not being under any obligation to endow the young Woman, had given her a sum of Money for her Portion out of mere liberality, she being either of age, or under the tuition of her Father, Mother, or of a Tutor, the loss of this Portion, altho' the Donor had paid it to the Husband when insolvent, would not free her from the obligation of accounting for it to her Co-heirs, if she would succeed as Heir to the Donor who gave her the said Portion. For this loss would be a casualty which could not be imputed either to the Donor, or to his Heirs.

¹ Quia enim dedimus mulieribus electionem etiam constante matrimonio, si male res maritus gubernet, & accipere eas, & gubernare, & secundum decentem modum, & sicuti nostra constitutio dicit: siquidem suae potestatis & perfectae aetatis mulier est sibi met culpam inferat, cur mox viro inchoante male substantia uti non percepit, & non auxiliata est sibi. Sic enim habitura erat in collationis ratione proprias res undique, & sine diminutione, & in ea minus collationem facere. Nov. 97. c. 6.

^m Sin autem illa quidem haec contestata est patrem, ille autem neque movit, neque consensit, & neque dedit licentiam filiae hoc agere, non eam periculum pati, sed & conferri nudam actionem contra inopis mariti res, & fortunam esse communem & ipsi & ejus fratribus, non tamen ex collatione damnificari: sed competentem ei partem dari ex paternis rebus, actionem illa quidem conferente. d. c. 6. §. 1.

We have endeavoured to form this Article upon such part of the Text as agrees with our Usage.

IX.

Besides the Donations in favour of Marriage, and the Marriage Portions of Daughters, all other Donations made by a Father, Mother, or other Ascendant, to a Son, or a Daughter, or other Descendant, married or unmarried, ought

to

9. All other
Donations
are brought
into the Mass
of the Inhe-
ritance.

to be brought into the Succession, whether the deceased made a Testament, or died Intestate, unless the Donee has been discharged from the Collation by the Donor, as has been said in the sixth Article. And altho' the Collation be not enjoined by the Testament when there is one, yet the Donee is nevertheless obliged to it^a.

^a Illud quoque bene se habere credimus hac lege complecti: prioribus enim legibus valentibus, in collationibus, si quidem sine testamento morerentur parentes, collationes secundum earum virtutem fieri: si vero testati nihil dicentes de eis, locum non fieri collationibus, sed res habere per dotem fortè, aut alio modo datas, & quæ sint relicta defendere. Nos sancimus, non esse omnino talem opinionem: sed si quispiam intestatus moriatur, siue testatus (quoniam incertum est ne forsân oblitus datorum, aut præ tumultu mortis angustiat, hujus non est memoratus) omnino esse collationes, & exinde æqualitatem, secundum quod olim dispositum est. Nisi expressim designaverit ipse se velle non fieri collationem, sed habere eum qui cogitur ex lege conferre & quod jam datum est, & ex jure testamenti. Omnibus quæ prius de collationibus à nobis sancita sunt in sua virtute manentibus. Nov. 18. c. 6. See the eleventh Article.

Si filiafamilias constituta tibi (*fundus*) à patre donatus est, cum sorore patri communi succedens eum præcipuum habere, contra jura postulas. l. 13. C. de collat.

Ex causis donationis, vel aliunde tibi quesita, si avi successionem respueris, conferre fratribus compelli non potes. l. penult. C. fam. ereisc.

Seeing this Law speaks of Donations without distinction, and exempts from the Collation only him who renounces the Inheritance; it follows, that on the contrary he who does not renounce, is bound to bring in all sorts of Donations.

X.

10. What-
ever may be
reckoned as
a part of the
Legitime, or
Child's part
ought to be
brought in.

All that the Children, and other Descendants have received from their Father, Mother, or other Ascendants, which might be reckoned to them as part of their Legitime, or Child's part, is subject to Collation. Thus the Monies which have been laid out on the purchase of some Office for one of the Children, and other such like liberalities, ought to be brought into the Mass of the Inheritance. For otherwise these bounties would be advantages which would destroy the Equality among the Children^o.

^o Omnia quæ in quartam portionem ab intestato successionis computantur his qui ad actionem de inofficioso testamento vocantur, etiamsi intestatus is decesserit ad cujus hereditatem veniunt, omnimodo cohæredibus suis conferunt. Quod tam in aliis, quam in his quæ occasione militiæ uni heredum ex defuncti pecuniis acquisitæ lucratur is qui militiam meruit, locum habebit: ut lucrum quod tempore mortis defuncti ad eum pervenire poterat, non solum testamento condito quartæ parti ab intestato successionis computetur, sed etiam ab intestato conferatur. l. 20. C. de collat.

XI.

As the Collation which the Children and other Descendants who succeed to their Father, Mother, or other Ascendants, owe reciprocally to one another, is equally due, whether the Ascendant to whom they succeed has enjoined it by some disposition, or whether he has given no orders about it; so it is the same thing with respect to the Collation, whether the Donor has left behind him a Testament, or died Intestate; and it is likewise indifferent, whether, when there is a Testament, the Collation is enjoined by it, or whether it makes no mention at all of it. For it is only the express will of the Donor that can free the Donee from bringing in the Gift^p. And if a Testator has omitted to direct in his Testament the Collation of the Donations which he had made before, the Law supplies that omission, and presumes that he had forgot the Donations which are subject to Collation^q.

^p Sive quispiam intestatus moriatur, siue testatus, omnino esse collationem, nisi expressim designaverit ipse se velle non fieri collationem. Nov. 18. c. 6. See this text intire, as it is quoted on the ninth Article.

^q Quoniam incertum est ne forsân oblitus datorum, aut præ tumultu mortis angustiat, hujus non est memoratus. Nov. 18. c. 6.

XII.

If the Grand-father by the Father's side had endowed his Grand-daughter, the Father being alive, and that after the death of this Grand-father, the Father who had survived him had left together with this Daughter, other Children, or Grand-children, who were to succeed to him as his Heirs, she would be obliged to bring into the Inheritance of her Father, the Portion which the Grand-father had given her. For, seeing it was the duty of the Father to endow his Daughter, it was for him that the Grand-father gave her her Marriage Portion. So that it was the same thing as if the Father had given the Portion out of his own Estate. Which makes the said Portion to be subject to the Collation, that the other Children, who are Heirs to their Father, may have a share in it^r.

^r Dotem quam dedit avus paternus an post mortem avi, mortua in matrimonio filia, patri reddi oporteat, quaeritur? Occurrit æquitas rei, ut quod pater meus propter me filix mea nomine

11. The Collation is due whether the deceased left behind him a Testament, or died intestate.

12. The Daughter brings into the Succession of the Father, the Portion given her by the Grand-father on the Father's side.

he dedit, proinde sit atque ipse dederim, quippe officium avi circa nepotem ex officio patris erga filium pendet. Et quia pater filiz, ideo avus propter filium nepoti dotem dare debet. l. 6. ff. de collat.

Altho' this Law speaks only of the Right of Reversion of this Marriage Portion in favour of the Father, yet we have thought proper to draw from thence the Rule explained in this Article for the Collation, and that upon two considerations. One is, that this Law being placed under the Title of Collation, we may conclude from thence that it has been put there with this view, that the Collation is due in this case. The other is, that the same Equity which makes us to consider the Marriage Portion given by the Grandfather as if it were given by the Father, in order to give to the Father the Right of Reversion of this Portion, as having proceeded from himself, demands likewise that the same Portion should be brought into the Father's Inheritance, since we ought to look upon it as having proceeded from the Father, and that if he had survived, her the Reversion of this Portion would have augmented his Succession. And besides, seeing this Daughter finds in her Father's Succession that of her Grandfather, it is just likewise for this reason, that this Portion should be brought into it. Thus as we have put down the Rule drawn from this Law for the Right of Reversion, among the other Rules of this matter, the same reason has induced us to set down here such another Rule for the Right of Collation.

* See the sixth Article of the third Section of the second Title of this second Book.

It seems to follow from the Rule explained in this Article, that if a Grandfather had made any Present to his Grandchildren, their Father being alive, who afterwards succeeded to the Grandfather, he ought to bring into the Grandfather's Succession, the Presents which had been made to his Children. And it is so regulated by the Customs of some places; which have likewise directed, that the Grandson succeeding to his Grandfather by Representation of his deceased Father, should bring into the Mass of the Goods, that which the said Grandfather had given to his Father. Which is founded upon this, that as this Son succeeds to the Grandfather in the

place of his Father, it is but just that he should bring in what his Father would have been obliged to do, if he had succeeded; and in general, it is equitable in all cases, that the Equality, which is the foundation of the Right of Collation, should be observed among all the Descendants who are to share the Successions of their Ascendants. See the close of the following Article.

XIII.

If the things that were given had perished without the fault of the Donor, whether it be after or before the Succession was open, he would not be bound to bring in their value. For whatever perishes in such a manner that the loss thereof cannot be imputed to the deed of any person, the loss falls upon the Owner of it, and upon all those who have any right in it. And as to the profits which the Donor may have reaped from the things which were given him, those which he had made before the Succession was open, belonged intirely to himself, and were no part of the Inheritance. But if the thing did not perish till after the Succession was open, then the profits which had been made after the Succession was open, would be considered as a part of the Succession, and subject to Collation. And in general, the Children that are Co-heirs to their Ascendants, ought to bring into the Mass of the Inheritance reciprocally for the benefit of one another, all that Reason and Equity can demand, for making their condition as equal as is possible.

De illis, quæ sine culpa filii emancipati post mortem patris perierunt, quaeritur ad ejus detrimentum ea pertinere debeant. Et plerique putant ea, quæ sine dolo & culpa perierint, ad collationis onus non pertinere. Et hoc ex illis verbis intelligendum est, quibus prætor viri boni arbitrato jubet conferri bona. Vir autem bonus non sit arbitraturus conferendum id, quod nec habet, nec dolo, nec culpa defuit habere. l. 2. §. 2. ff. de collat.

Prætor viri boni arbitrato jubet conferri bona. d. §. 2. See the sixth Article of the first Section.

XIV.

We must not comprehend in the number of things perished, which have been mentioned in the foregoing Article, those which perish by casualties, such as a House by Fire, a Land or Tenement carried away by a Flood or Inundation, Moveables taken away by Robbery. But we ought not to place in

in this rank, the things which perish by their own nature, such as Cattle; or those which are consumed by their use, such as Money, Corn, Liquor. For altho' these things are not in being when the case of their Collation happens, yet the Donee is nevertheless bound to bring in their value; because the delivery which had been made of them to him, had given him all the use that could be made of them^u.

^u This is a consequence of the nature of those sorts of things.

It is not proper to enlarge here

on the several Questions which may arise from this matter of Collation; for besides that these Questions are not contained in the Laws, they are not within the design of this Book. It suffices here to lay down the Principles on which the decisions of those Questions which have not their proper Rules in the Customs, do depend. And whereas the variety of Questions would only serve to confound and perplex the Reader; the bare view of the Principles, rightly understood, gives all the light that is necessary for all sorts of difficulties.

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